TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

No. ~~355~~ 95

THE TEXAS AND PACIFIC RAILWAY COMPANY, APPELLANT,

vs.

THE INTERSTATE TRANSPORTATION COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF LOUISIANA.

FILED FEBRUARY 27, 1891.

(14,499.)

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

No. 395.

THE TEXAS AND PACIFIC RAILWAY COMPANY, APPELLANT,

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APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF LOUISIANA.

INDEX.

	Original.	Print.
Caption	*a*	1
Bill of complaint	1	1
Order on bill	7	5
Copy of restraining order	8	5
Return on restraining order	9	6
Return on original restraining order	10	6
Subpœna in chancery	10	6
Return on subpœna	11	6
Hearing and submission on motion for injunction	12	7
Appearance for defendant	13	7
Decree refusing injunction	13	8
Demurrer	14	8
Hearing and submission of demurrer	16	9
Decree sustaining demurrer	16	9
Petition for rehearing and order for re-argument	17	10
Hearing and submission of petition for rehearing	19	11

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JANUARY 27, 1894.

	Original.	Print.
Order vacating decree of January 16, 1891, and application for rehearing taken under advisement	20	11
Decree maintaining demurrer and dismissing bill	20	11
Motion and order for appeal	21	11
Citation waived by defendant	22	12
Bond for appeal	23	12
Agreement to omit affidavits from record on appeal	25	14
Clerk's certificate	26	14
Opinion on motion for injunction	27	15
Opinion on demurrer	32	17
Assignment of errors	35	19

a UNITED STATES OF AMERICA:

Circuit Court of the United States, Eastern District of Louisiana.

THE TEXAS AND PACIFIC RAILWAY COMPANY, Appellant,
versus
THE INTERSTATE TRANSPORTATION COMPANY, Appellee. } No. 11896. In Equity.

Howe & Prentiss, Esquires, for complainant, appellant.
Joseph P. Hornor & Son, Esquires, for defendant, appellee.

Appeal returnable to the Supreme Court of the United States of America, at the city of Washington, D. C., on the first Monday in March, A. D. 1891.

Transcript of Appeal.

1 Circuit Court of the United States, Eastern District of Louisiana.

THE TEXAS AND PACIFIC RAILWAY COMPANY
vs.
THE INTERSTATE TRANSPORTATION COMPANY. } In Equity. No. 11896.

Bill of Complaint. Filed March 29, 1890.

To the judges of the circuit court of the United States for the fifth circuit and eastern district of Louisiana and at New Orleans:

The Texas and Pacific Railway Company, a corporation created by and under the laws of the United States and having a business domicile and principal office in Louisiana, at New Orleans, La., brings this its bill against "The Interstate Transportation Company," a corporation created by and under the laws of the State of Louisiana and having its domicile and office in the city of New Orleans, within said eastern district; and thereupon your orator complains and says:

First. That your orator is a corporation other than a banking corporation created by and organized under and by virtue of certain acts of Congress of the United States, to wit: 1st, "An act to incorporate the Texas and Pacific Railroad Company and to aid in the construction of its road, and for other purposes," approved March 3d, 1871, being chapter 122 of Acts of 1871; 2d, an act supplemental to the foregoing, approved May 2d, 1872, being chapter 132
2 of the Acts of Congress of 1872; 3d, an act supplemental to said act of 1871, approved March 3d, 1873, being chapter 257 of the Acts of Congress of 1873; 4th, an act supplemental to said act of 1871, approved June 22d, 1874, being chapter 406 of the Acts of Congress of 1874.

That the Southern Pacific Railroad Company of Texas, created by acts of the legislature of that State of February 16th, 1852, and August 16th, 1856, and the Southern Transcontinental Railway Company of Texas, created by acts of the legislature of that State of July 27th, 1870, were prior to said 22d day of June, 1874, merged in and consolidated with said Texas and Pacific Railway Company, and your orator, the said Texas and Pacific Railway Company, acquired and now owns all the property, rights, powers, privileges, and franchises of said Southern Pacific Railroad Company and said Southern Transcontinental Railway Company, and such acquisition, merger, consolidation, and ownership were recognized, affirmed, and approved by the said act of Congress of June 22d, 1874.

That thereafter and prior to the beginning of this suit, by deed dated June 20th, 1881, made by and between the New Orleans Pacific Railway Company, a corporation of Louisiana, created by and under the laws of Louisiana (being act No. 14 of 1876), party of the first part, and your orator, party of the second part, your orator purchased and acquired the railway and appurtenant property of the said New Orleans Pacific Railway Company, including the line thereof through the parish- of Pointe Coupée, Avoyelles, and St. Landry, concerning which allegations are made by plaintiff in this cause, and the said New Orleans Pacific Railway Com-
3 pany, to the extent set forth in said deed (and reserving its corporate existence for certain purposes and as to certain other property), became merged in and consolidated itself with your orator, said Texas and Pacific Railway Company, and your orator took possession of said railroad of the New Orleans Pacific Railway Company, through said parish- and elsewhere, and has completed and operated the same pursuant to and in virtue of powers, rights, and franchises conferred by the laws of the United States, and the said Texas and Pacific Railway Company forms an important and comprehensive medium of interstate commerce.

Second. That said Interstate Transportation Company owns or controls and operates certain tow-boats and barges in the lower Mississippi river and tributaries, some of which tow-boats are called respectively the "Henry Marx," "Arthur Lambert," and "T. A. Hendricks," and carries on for hire the business of towing said barges loaded with coal and other very heavy cargoes.

Third. That your orator has, as part of its main line of railway between New Orleans and El Paso, Texas, a certain bridge across the Atchafalaya river, built at great expense and which is of a value exceeding three hundred thousand dollars, and which is a structure erected according to law and in accordance with the special legislation hereinbefore cited, and especially the act No. 14 of 1876 of the General Assembly of Louisiana. Said river is wholly within the State of Louisiana. The said bridge has a suitable draw of ample size, being about two hundred and fifty-three feet in span, making a channel on each side of the centre of the draw of one hundred and twenty-six feet.

4 The said bridge is not an obstruction to navigation, is in every respect a legal structure, and is absolutely essential to the business of your orator and to enable it to perform its public duties; that any injury to said bridge whereby it should be disabled for use by your orator would cut in two the main line of your orator's railway and inflict irreparable injury on your orator, as more particularly hereinafter set forth.

Fourth. That about the 19 February last past and during the prevalence of the unusually high water and flood of the present season the tow-boat "Lambert," of said defendant company, while undertaking to pass through said draw, which had been duly opened for it, struck with its tow of barges the bridge seat at the eastern end of the draw of said bridge, injured the same considerably, and came near disabling the structure for use and inflicting on your orator an injury greater in amount than all the assets and property of the said defendant company. Said accident was caused by the attempt of the said tow-boat to carry through said draw upon the unusual flood waters of said river more barges at one time than could be safely and surely handled under such circumstances. Your orator at once notified said defendant company of the affair and warned it of the danger of such conduct and the manifestly irreparable injury that would come from the same if the bridge should be in anywise disabled; but the officers and agents of said defendant company would make no effort to prevent a repetition of such conduct nor give any assurance that the said conduct and method, which were manifestly tortious and unlawful, would not be repeated; that in fact within the last week, while without
5 any fault of your orator the flood waters of said river have been still higher and the current still swifter and more dangerous, the said "Lambert" or other of said defendant's boats has been passing or attempting to pass through said draw with six barges in one tow, threatening to strike and destroy said bridge, and this at a time and emergency when none of the said tow-boats of the said company defendant have power to control and guide such a tow with safety or any tow exceeding two barges.

Fifth. Your orator avers that at high water like the present it is unlawful, tortious, and dangerous and unnecessary for the tow-boats of said defendant company to pass through said draw of said bridge with more than two of their said barges in tow; that while said draw is of ample width for all the navigation of said stream, yet if said defendant company for its own convenience and profit undertakes to carry through more than said number of barges the high water and currents will or may at any moment swing the long tows in a direction across the opening of said draw and tend to strike and destroy said bridge; that in case said bridge should be disabled the loss and injury could not be compensated by actions for damages at law nor could said defendant company respond to judgments at law for the great injury which would be caused by the disabling or destruction of said bridge and the suspension of your orator's main line; that such injury would be irreparable as aforesaid and would disable your orator from performing its duties

to the public as well as to its stockholders, and that the injunction herein prayed for is necessary to prevent a multiplicity of suits and irreparable injury, and in the meantime a restraining order is needful.

6 That the matter in controversy herein exceeds the sum of one hundred thousand dollars, and that your orator reserves its claims for pecuniary damages for injury heretofore done or hereafter inflicted.

It further avers that said high water and violent currents and flood still continue and may increase and will exist for a long time and are of a very unusual and serious character, and that the tow-boats of said defendant company have not the power to safely guide each more than two of said barges through said bridge at a time, and that the extraordinary floods, lifting them and their tows above the piers and so that in case of collision they will strike the framework of said bridge, render the situation one of unusual emergency and extreme and instant danger, and which urgently requires the relief herein prayed.

To the end, therefore, that your orator may have such relief in the premises as can only be afforded by a court of equity, and that an injunction may issue herein restraining and prohibiting the said Interstate Transportation Company, its officers, managers, masters, captains, agents, servants, and attorneys, from passing any tow-boat through the draw of the Atchafalaya bridge of the Texas and Pacific railway, which bridge is over the Atchafalaya river at or near Melville, Louisiana, at high water with more than two barges in two of such tow-boat, and from in any way striking, injuring the said bridge, and that a restraining order may be issued herein according to law, and that such injunction may be made perpetual, and that the defendant may be condemned to pay costs and the complainant have such further and other relief as may be just and equitable—

7 May it please your honors to grant to your orator a writ of subpœna under seal of this court, commanding the said "Interstate Transportation Company" to appear herein at a day to be fixed by said process and full, true, and perfect answer make in the premises and to abide the decrees and orders of this hon. court.

And your orators pray for general relief.

(Signed) HOWE & PRENTISS,
Sol'rs for Complainants.

(Signed) W. W. HOWE,
Of Counsel.

U. S. OF AMERICA:

John A. Grant, being duly sworn, says that he is the third vice-president and general manager of the complainant in this cause; that the foregoing bill of complaint is true of his own knowledge except as to the matters therein stated on information and belief, and as to those matters he believes it to be true.

(Signed) JNO. A. GRANT.

Sworn before me March 29, 1890.
[L. S.] (Signed) J. G. EUSTIS, *Not. Pub.*

Order.

Let a restraining order issue, as herein prayed for and according to law, and let the defendant show cause on Saturday, April 12th, 1890, at 11 a. m., why an injunction, as prayed for in the bill, should not be granted in this cause *pendente lite*, or why such other order should not be made as may be just.

March 29, 1890.

(Signed) DON A. PARDEE, *Judge*.

8 *Copy of Restraining Order. Issued March 29, 1890.*

UNITED STATES OF AMERICA:

Circuit Court of the United States, Fifth Judicial Circuit and Eastern District of Louisiana, New Orleans Division.

THE TEXAS & PACIFIC RAILWAY COMPANY
vs.
INTERSTATE TRANSPORTATION COMPANY. } No. 11896.

The President of the United States to the Interstate Transportation Company, New Orleans, Greeting:

Whereas it has been represented unto us in our said circuit court on the part of the Texas & Pacific Railway Company in a bill in equity lately exhibited against you touching certain matters and things therein set forth; and whereas the Honorable Don A. Pardee, one of the judges of our said *said* court, upon due consideration thereof has made and allowed an order in said cause whereby you are required to show cause on the 12th day of April, 1890, why an injunction should not issue as prayed for in said bill of complaint; and whereas the said judge has granted and allowed an order restraining you immediately and forthwith and during the pendency of said motion for an injunction to the full extent and effect as prayed for in said bill of complaint:

Now, therefore, in consideration of the premises and of the allegations in said bill contained, you, the said Interstate Trans-
9 portation Company, your masters, captains, officers, managers, agents, attorneys, and servants, and each of you are hereby commanded and strictly enjoined under the penalty of the law that you and each of you absolutely refrain and desist from passing any tow-boat through the draw of the Atchafalaya bridge of the Texas Pacific railway (which bridge is over the Atchafalaya river at or near Melville, La.) at high water with more than two (2) barges in tow of said tow-boat and from in any way striking or injuring said bridge.

And that you, the said Interstate Transportation Company, your masters, captains, officers, managers, agents, attorneys, and servants,

and each of you remain so inhibited and restrained until the further order of our said court in the premises.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 29 day of March, in the year of our Lord one thousand eight hundred and ninety.

[SEAL.] (Signed) E. R. HUNT, *Clerk.*

CLERK'S OFFICE.

A true copy of the original issued this day.
New Orleans, March 29, '90.

[SEAL.] (Signed) E. R. HUNT, *Clerk.*
By H. J. CARTER,
Dy Clerk.

Return.

STATE OF LOUISIANA, }
Parish of St. Landry. }

10 This is to certify that I, Andrew Bier, agent of the T. & P. R. R. Co., served in person on Capt. Jackson, of the steamer Henry Marx, the attached restraining order No. 11896, Saturday, the 5th day of April, A. D. 1890, and also the same restraining order, No. 11895, served in person on Capt. J. V. Higby, of the steamer Arthur Lambert, served on Monday, April the 7th, A. D. 1890, at Melville, La.

(Signed) ANDREW BIER,
Agent Texas and Pacific Ry Co.

Sworn to and subscribed before me, a justice of the peace in and for the parish and State above written.

(Signed) GEO. N. McBRIDE,
Justice of the Peace.

Return on Original Restraining Order.

Received by U. S. marshal, New Orleans, La., Mch 29, '90, and on the same day I served a true copy of the within restraining order on the Interstate Transportation Company, New Orleans, by leaving the same at the office of said company, No. 49 Carondelet street, in the city of New Orleans, in hands of J. E. Crusel, secretary of said company, in person.

(Signed) J. B. DONNALLY,
U. S. Marshal.
By J. E. BOEHLER,
Dy U. S. Marshal.

Subpœna in Chancery. Issued 29 March, 1890.

UNITED STATES OF AMERICA:

11 The President of the United States to the marshal for the eastern district of Louisiana, Greeting:

You are hereby commanded to summon Interstate Transportation Company to appear before the honorable the judges of the fifth

judicial circuit of the United States of America, at a circuit court to be holden on the first Monday of May, 1890, then and there to answer a bill in chancery filed against it, wherein The Texas and Pacific Railway Company is complainant and said Interstate Transportation Company is defendant.

Herein fail not, and have you then and there this writ, with your endorsement thereon how you have executed the same.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States of America, this 29 day of March, in the year of our Lord one thousand eight hundred and ninety, and the 114 year of American Independence.

[SEAL.] (Signed) E. R. HUNT, *Clerk.*

The defendant is hereby notified that it is required to enter its appearance in the clerk's office of the United States circuit court on or before the first Monday of May, 1890; otherwise the bill may be taken *pro confesso.*

(Signed) E. R. HUNT, *Clerk.*

Return.

Received by U. S. marshal, New Orleans, La., M'ch 29, '90, and on the same day I served a true copy of the within subpœna in
12 chancery on the Interstate Transportation Company, New Orleans, by leaving the same at the office — said company No. 49 Carondelet street, in the city of New Orleans, in hands of J. E. Crusel, secretary of said company, in person.

(Signed) J. B. DONNALLY,
U. S. Marshal.
By J. E. BOEHLER,
By U. S. Marshal.

Hearing and Submission on Motion for Injunction Pendente Lite.

Extract from the Minute Book, November Term, 1889.

NEW ORLEANS, SATURDAY, *April* 26, 1890.

Court met pursuant to adjournment.
Present: Hon. Don A. Pardee, circuit judge.

TEXAS & PACIFIC RAILWAY CO.
vs.
INTERSTATE TRANSPORTATION COMPANY. } No. 11896.

This cause came on this day to be heard upon the application of the complainant for an injunction *pendente lite*—present, Howe & Prentiss, for complainant; J. P. Hornor & Son, for defendant—and was argued by the counsel for the parties respectively and submitted, when the court took time to consider.

13 *Appearance. Filed May 5, 1890.*

TEXAS & PACIFIC RY CO.
vs.
INTERSTATE TRANSPORTATION CO. } No. 11896.

The clerk will enter an appearance on behalf of defendant, The Interstate Transportation Company.

New Orleans, 5 May, 1890.

(Signed) JOSEPH P. HORNOR & SON, *Solicitors.*

Decree Refusing Injunction. Entered and Filed May 13, 1890.

Circuit Court of the United States, Eastern District of Louisiana.

TEXAS & PACIFIC RAILWAY COMPANY
vs.
INTERSTATE TRANSPORTATION COMPANY. } No. 11896. In Equity.

This cause having been heard upon the application of the complainant for an injunction *pendente lite* and submitted on bill,
14 affidavits, evidence, and arguments of counsel, and having been considered by the court—

It is now ordered, for the reasons assigned in the written opinion this day filed, that the injunction *pendente lite* asked for be refused, and that the restraining order heretofore granted herein be dissolved.

(Signed) DON A. PARDEE, *Judge.*

New Orleans, May 13, 1890.

Demurrer. Filed June 2, 1890.

United States Circuit Court, Eastern District of Louisiana.
In Chancery.

TEXAS & PACIFIC RY COMPANY
vs.
INTERSTATE TRANSPORTATION CO. } No. 11896.

The demurrer of The Interstate Transportation Company, defendant, to the bill of complaint of The Texas & Pacific Railway Company, complainant.

This defendant, by protestation, not confessing all or any of the matters and things in the said complainant's bill contained to be true in such manner and form as the same are therein set forth, demur to said bill,—made such a case as entitles it to the relief prayed as to the matters contained in the said bill, or any of such matters.

15 Wherefore, and for divers other good causes of demurrer appearing in said bill, this defendant demurs thereto, and it

prays the judgment of this honorable court whether it shall be compelled to make any further or *other* answer to said bill, and it humbly prays to be hence dismissed with its reasonable costs in this behalf sustained.

(Signed) JOSEPH P. HORNOR & SON,
Solicitors for Defendant.

UNITED STATES OF AMERICA, *Eastern District of Louisiana*, } *ss:*

James P. Jackson, pres'd't defendant corporation in the above-entitled cause, being duly sworn, says that the foregoing demurrer is not interposed for delay.

(Signed) JAS. P. JACKSON,
Pres'd't Interstate Transp't'n Co.

Sworn and subscribed to before me this 2d day of June, 1890.
[SEAL.] (Signed) J. B. WARD, *Not. Pub.*

I hereby certify that in my opinion the foregoing demurrer is well founded in point of law.

(Signed) JOSEPH P. HORNOR, *Of Counsel.*

16 *Hearing and Submission of Demurrer.*

Extract from the Minute Book, November Term, 1890.

NEW ORLEANS, SATURDAY, *January 10th*, 1891.

Court met pursuant to adjournment.
Present: Hon. Edward C. Billings, district judge.

TEXAS & PACIFIC RY CO. *vs.* INTERSTATE TRANSPORTATION CO. } No. 11896.

This cause came on this day to be heard on the demurrer filed by defendant—present, W. W. Howe, for complainant; Jos. P. Hornor, for defendant—and was argued by the solicitors for the parties respectively and submitted, when the court took time to consider.

Decree Sustaining Demurrer. Entered and Filed January 16, 1891.

Circuit Court of the United States, Eastern District of Louisiana.

TEXAS & PACIFIC RAILWAY CO. *vs.* INTERSTATE TRANSPORTATION CO. } No. 11896. In Equity.

17 This cause was heard at a former day upon the demurrer to the bill of complaint herein filed by the defendant, and after hearing argument from Mr. W. W. Howe, for complainant, and Mr. Jos. P. Hornor, for defendant—

It is ordered, adjudged, and decreed, for the reasons assigned in the opinion filed this day, that the said demurrer be, and the same

is hereby, maintained and the bill dismissed with costs, without prejudice to complainant's right to institute any action it may have at law.

January 16, 1891.

(Signed) EDWARD C. BILLINGS, *Judge*.

Petition for Rehearing and Order for Reargument. Filed January 17, 1891.

U. S. Circuit Court, E. D. of Louisiana.

THE TEXAS & PACIFIC RAILWAY COMPANY } No. 11896. In Equity.
vs.
THE INTERSTATE TRANSPORTATION COMPANY. }

To the honorables the judges of the court:

The petition of the complainant herein respectfully shows that there is error to its prejudice in the opinion pronounced and the decree rendered herein January 16th, 1891, sustaining the
18 demurrer and dismissing the bill of complaint.

Petitioner respectfully asks the attention of the court again to the acts of Congress set forth specially in the bill of complaint, whereby it is seen that the complainant has been created and established by the Congress of the United States for the purpose of constructing a highway of interstate commerce and a military and post road from the Mississippi river to the Pacific ocean, and the same has been established under said acts of Congress and the rights acquired thereunder.

Complainant, petitioner herein, refers specially on this point to the said acts of Congress of March 3, 1871, sections 4, 5, 6, & 19; acts of May 2nd, 1872, section 5; act of June 22nd, 1874; act of legislature of Texas to incorporate the Southern Transcontinental Railway Company of July 27, 1870, section 3rd, and to the opinion and decree of this court in Allen *vs.* T. & P. Railway Company, 25th Federal Reporter, p. 513.

Petitioner shows that its said railway so established from New Orleans, Louisiana, to El Paso, Texas, passes, as appears by said bill of complaint, over the bridge in question, which bridge is a part of said military and post road and has been operated as such for upwards of seven years.

Petitioner respectfully asks for a rehearing of this cause on said demurrer, and that said demurrer be overruled, and for general relief.

HOWE & PRENTISS,
Solicitors for Complainants.

Let this petition be filed and let this matter be set down
19 for reargument on January 21, 1891, at 11 a. m.

(Signed) EDWARD C. BILLINGS, *Judge*.

Jan. 17, 1891.

Hearing and Submission of Petition for Rehearing.

Extract from the Minute Book, November Term, 1890.

NEW ORLEANS, WEDNESDAY, *January* 21, 1891.

Court met pursuant to adjournment.
Present: Hon. Edward C. Billings, district judge.

TEXAS & PACIFIC R'Y CO. *vs.* INTERSTATE TRANSPORTATION CO. } No. 11896.

The application of the complainant for a rehearing herein came on this day to be heard—present, W. W. Howe, for the complainant; Jos. P. Hornor, for defendant—and was argued by the solicitors for the parties respectively and submitted, when the court took time to consider.

20 *Order Vacating Decree of Jan'y* 18, '91, *and Application for Rehearing Taken under Advisement. Entered and Filed January* 23, 1891.

Circuit Court of the United States, Eastern District of Louisiana.

TEXAS & PACIFIC RAILWAY COMPANY *vs.* INTERSTATE TRANSPORTATION CO. } No. 11896.

The petition of complainant for rehearing having been filed with leave of the court and argued by counsel—

It is now ordered that the decree entered and signed herein at the present term, to wit, on 16th January, 1891, dismissing the bill, be vacated and the application for a rehearing be taken under advisement.

(Signed) EDWARD C. BILLINGS, *Judge.*

New Orleans, January 23, 1891.

Decree Maintaining Demurrer and Dismissing Bill. Entered and Filed February 4, 1891.

Circuit Court of the United States, Eastern District of Louisiana.

21 TEXAS & PACIFIC RAILWAY CO. *vs.* INTERSTATE TRANSPORTATION CO. } No. 11896. In Equity.

This cause was heard at a former day upon the demurrer to the bill of complaint herein filed by the defendant, and after hearing argument from Mr. W. W. Howe, for complainant, and Mr. Jos. P. Hornor, for defendant—

It is now ordered, adjudged, and decreed, for the reasons assigned

in the opinion filed January 16, 1891, that the said demurrer be, and the same is hereby, maintained and the bill dismissed with costs without prejudice to complainant's right to institute any action it may have at law.

(Signed) EDWARD C. BILLINGS, *Judge.*

February 4, 1891.

Motion and Order for Appeal. Entered and Filed February 11, 1891.

U. S. Circuit Court, Eastern District of Louisiana.

THE TEXAS & PACIFIC RAILWAY COMPANY
vs.
THE INTERSTATE TRANSPORTATION COMPANY. } No. 11896.

22 And now, at the same term at which the final decree herein has been rendered and signed, and on motion in open court of Howe & Prentiss, solicitors and counsel for complainants, and on suggesting that there is error in the said final decree herein sustaining the demurrer of defendant and dismissing the suit, which decree was rendered and signed February 4th, 1891, and that the complainants desire an appeal from said final decree and of this cause to the Supreme Court of the United States—

It is ordered that an appeal be granted herein from said final decree and of this cause to the Supreme Court of the United States, returnable thereto, according to law, within thirty days from the signing of the citation on said appeal, and on the 1st Monday of March, 1891, and that said appeal operate as a supersedeas on the complainant, appellant, furnishing bond and surety in the sum of two hundred and fifty dollars, conditioned according to law.

Thus done and signed in open court at New Orleans, Louisiana, Feb'y 11th, 1891.

(Signed) EDWARD C. BILLINGS, *Judge.*

Citation waived by defendant.

(Signed) JOSEPH P. HORNOR & SON,
Solicitors for Def't and Appellee.

N. O., 12 Feb'y, 1891.

23 UNITED STATES OF AMERICA:

Know all men by these presents that we, The Texas & Pacific Railway Company, as principal, and Thomas J. Woodward, of the city of New Orleans, as surety, are held and firmly bound, jointly and severally, unto The Interstate Transportation Company of New Orleans in the sum of two hundred and fifty dollars, lawful money of the United States of America, to be paid to the said obligee, its successors and assigns; for which payment, well and truly to be made, we bind ourselves and each of us by himself and each of our heirs, executors, and administrators firmly by these presents.

Sealed with our seals and dated the 12th day of February, in the year of our Lord eighteen hundred and ninety-one.

Whereas the said The Texas & Pacific Railway Company having heretofore, to wit, on the 11 day of February, 1891, taken an appeal to the Supreme Court of the United States from and to reverse the decree rendered on the 4th day of February, 1891, by the circuit court of the United States for the fifth circuit, holding sessions in and for the eastern district of Louisiana, at New Orleans, in the above-entitled suit of said Texas & Pacific Railway Company against said Interstate Transportation Company, and having taken an appeal of said cause, being No. 11896 of the docket thereof, as by the order of appeal appears:

Now, the condition of the above obligation is that if the above-bounden The Texas & Pacific Railway Company shall prosecute its said appeal to effect and shall answer all damages and costs if it shall fail to make good its plea, then this obligation shall be void; otherwise to remain in full force and virtue.

THE TEXAS & PACIFIC RAILWAY COMPANY.

(Signed) ROBT STRONG, *Agt.* [L. S.]
(Signed) THOS. J. WOODWARD. [L. S.]

Signed, sealed, and delivered in the presence of—
(Signed) W. W. HOWE.

Bond and sufficiency of surety approved.
Feb'y 12, 1891.
(Signed) EDWARD C. BILLINGS, *Judge.*

24 [Endorsed:] No. 11896. United States circuit court, E. district of Louisiana, at N. O. The Texas & Pacific Railway Company *vs.* The Interstate Transportation Company. Bond for appeal. Filed Feb'y 12th, 1891. —— ——, clerk.

UNITED STATES OF AMERICA, } ss:
Eastern District of Louisiana, }

Personally appeared Thomas J. Woodward, who, being duly sworn, deposes and says that he is the surety on the within bond; that he resides in New Orleans, Louisiana, and is worth the full sum of two hundred & fifty dollars over and above all of his debts and liabilities and property exempt from execution.

(Signed) THOS. J. WOODWARD.

Subscribed and sworn before me this 12th day of February, 1891.

[L. S.] (Signed) E. R. HUNT,
Commissioner U. S. Circuit Court, Eastern District of Louisiana.

25 *Agreement. Filed Feb'y* 14, 1891.

U. S. Circuit Court, Eastern District of Louisiana.

T. & Pacific R'y Co. }
vs. } No. 11896.
Interstate Transp'n Co. }

It is agreed that the affidavits on file herein may be omitted from the transcript of appeal.

N. O., 14 Feb'y, 1891.

(Signed) JOSEPH P. HORNOR & SON,
For Defendants.

26 United States of America:

Circuit Court of the United States, Fifth Circuit and Eastern District of Louisiana.

Clerk's Office.

I, Edward R. Hunt, clerk of the circuit court of the United States for the fifth circuit and eastern district of Louisiana, do hereby certify that the foregoing 25 pages contain and form a full, complete, true, and perfect transcript of the record and proceedings had, together with all the evidence adduced, on the trial of the case of The Texas & Pacific Railway Company *vs.* The Interstate Transportation Co., No. 11896 of the docket of the said court.

Witness my hand and the seal of said court, at the city of New Orleans, this 21 day of February, A. D. 1891.

(Seal U. S. Circuit Court for the 5th Circuit & Eastern District of La.)

E. R. HUNT, *Clerk.*

I, Edward C. Billings, United States judge for the eastern district of Louisiana, do certify that Edward R. Hunt, whose name is signed to the above certificate as clerk of the circuit court of the United States for the fifth circuit and eastern district of Louisiana, was at the time of signing said certificate and is now the clerk of said court; that said certificate is in due form of law, and that full faith and credit are due to his official attestations as such clerk.

Given under my hand, at the city of New Orleans, in said district, this 21 day of February, A. D. 1891.

EDWARD C. BILLINGS, *Judge.*

27 *Opinion on Motion for Injunction Pendente Lite. Filed May* 13, 1890.

United States Circuit Court, Eastern District of Louisiana, at New Orleans.

THE TEXAS & PACIFIC RAILWAY COMPANY
vs. In Equity.
THE INTERSTATE TRANSPORTATION COMPANY.

On motion for an injunction *pendente lite*.

Assuming that the case made by the bill is one that is within the jurisdiction of this court, sitting as a court of equity, and presents a case for equitable relief, still it appears on this hearing that two important facts encumbent upon the complainant to establish are left in doubt, if not actually disproved, to wit, that the complainant's bridge is properly constructed and guarded so as to interfere as little as possible with the free and safe navigation of the Atchafalaya river, and that the actual navigation by the defendant of the said river with its tow-boats and barges in each tow to the number of six is dangerous to the safety of the bridge.

It appears that the bridge seat at the eastern end of the bridge is constructed of wooden piles driven in the river, and that there is no protection by way of outer piling and guards to prevent any steamboat or tow from colliding directly with these
28 wooden supports of the bridge, and, when the river is very high, with the bridge itself, and that the pier in the middle of the stream, on which the bridge turns, is also unprotected with sufficient piles and guards.

Defendant produces thirteen affidavits of experienced men in the steamboat business, generally engaged in and familiar with the navigation of the Atchafalaya river, to the effect that the bridge is not a suitable bridge for the purpose for which it is intended by reason of the fact that to be properly constructed and protected it should have a line of piling from the outside upper corner of the Eastern bridge seat running diagonally up the river to the shore, which should be planked, and that the same precaution should be taken with the pier on which the bridge turns in the middle of the stream, which would then make a funnel through which boats and water craft of all kinds could pass without injury to themselves or the said bridge, and that if such precautions were taken it would insure perfect protection to the bridge itself and make navigation absolutely safe.

The complainant meets this point with an affidavit of John A. Grant, general manager of the complaining company, a civil engineer of well-established reputation, to the effect that the plan of protecting the bridge by the piling described is impracticable in the Atchafalaya river and similar streams; that it is not adopted at Morgan City bridge; that the effect of it would be to press the current against its curves and destroy it or push it over; that it would

injure the channel, bank up the water, and create additional eddies; also cause the water to eat out and undermine the supports, not only of such works, but of the bridge itself.

29 Of course this is a matter upon which the court has no expert knowledge, and can only be governed by the showing made by the parties.

The weight of evidence on this showing is against the complainant company. The affidavit of Vice-president and General Manager Grant, which is the main support of the complainant's case, contains this statement:

"Deponent further states that while the tow of defendant might pass through the western side of the draw, which has iron pieces on both sides, with safety to the bridge, they insist on passing through the eastern side of the draw, where, on the eastern side thereof, the bridge seat is of wood."

Counsel for complainant, on the hearing, stated to the court that there was no objection whatever to the use of the west side of the draw, as there was no danger to be apprehended from such use, no matter how many barges the defendant's tugs might undertake to tow through.

An inspection of the drawings of the bridge presented by the defendant shows that the west bridge seat is built upon caissons, which are apparently strongly made and well founded and fully able to withstand a collision with any tow of coal barges. It would seem from these facts that the objection made by the defendant to the construction of the bridge as incomplete is well founded.

If it is impracticable, for the reasons stated by General Manager Grant, for the complainants to put out the piling and guards mentioned in defendant's affidavit as necessary for the protection of the eastern end of the bridge, it would seem that there is noth-

30 ing to hinder, except perhaps expense, putting the eastern bridge seat on as substantial a foundation as the western, to wit, on caissons, with iron pieces on both sides; in other words, if the western bridge seat, on caissons with iron pieces on both sides, is properly made and is strong enough, as is admitted, to resist collisions from tows with any number of boats, why should not the eastern bridge seat, in the interest of navigation and with a view to obstruct the stream as little as possible, be constructed in the same way?

Second. The affidavits presented by the defendants, all, as stated above, by experienced men in the steamboat business generally engaged in and familiar with the navigation of the Atchafalaya river, are to the further effect that there is actually no danger to the complainant's bridge from the towing of defendant's barges in the usual manner through the said draw; that it has been continuously done since the construction of the bridge and during the yearly high water in the river without accident of any kind to the bridge, with the single exception stated in complainant's bill, which exception did not inflict any material injury on the bridge, and generally without accident to the boats and barges towed through.

The complainant's affidavits on the same point, two in number,

state apprehensions largely and, outside of the fact that one barge did slightly collide with the bridge seat, do not set forth specific facts.

The claim made in the bill and in General Manager Grant's affidavit "that the danger of taking three barges through at the present extraordinary stage of high water is greatly enhanced by the width of the tow combined with its length. The current of the
31 Atchafalaya river at that point is of great velocity, much more than that of the Mississippi river. It is a torrent and full of eddies. If a tow of three barges is diverted, as it is apt to be, from a direction parallel with the stream the danger of striking the bridge is excessive, and at high water the impact would be on the upper portion of the bridge or bridge seat, when the liability of the injury is excessive," is fully met by defendant's affidavits to the effect that such swinging of the entire tow in a direction across the opening of the bridge tending to strike and break said bridge is highly improbable and hardly possible, as the boats of the defendant company are in the habit of running a stern line to the shore, and there fastening it, which makes it impossible for the tow to swing.

In fact, the case is so left on the showing made that the court cannot say that it is actually dangerous to the safety of complainant's bridge that the defendants should tow through at the present stage of high water any number of barges in one tow up to the number of six.

It also appears by the affidavits presented by the defendant that the insurance companies taking risks upon the boats and barges towed through the complainant's bridge approve of the number of barges towed by the defendant, provided that — do not exceed three coal boats or more than six coal barges at any one time, and this, notwithstanding the character of the bridge, with the extremely high water and the rapidity of the current.

On the whole case I am of the opinion that the injunction *pendente lite* asked for should be refused and the restraining order heretofore granted should be dissolved, and it is so ordered.

May 13th, 1890.

(Signed) DON A. PARDEE,
Circuit Judge.

32 *Opinion on Demurrer. Filed June* 16, 1891.

Circuit Court of the United States, Eastern District of Louisiana.

THE TEXAS AND PACIFIC RAILWAY COMPANY
vs. No. 11896.
THE INTERSTATE TRANSPORTATION COMPANY.

Before Judge Edward C. Billings.

Mr. W. W. Howe, solicitor for complainant.
Mr. J. P. Hornor, solicitor for defendant.

This cause has been heard on a demurrer.

The complainant, under the permission given by the legislature

of Louisiana, Acts of 1876, No. 14, page 31, section 7, subdivision 6th, has erected a bridge over the Atchafalaya river as part of its railway bed. It is agreed by the defendant that the Atchafalaya river is wholly within the State of Louisiana, and that it was competent for the legislature of that State to give this permission, so that all question as to the authority of the State legislature is taken out of this case.

The act of the legislature is a part of the complainant's bill. The act is a general one authorizing the complainant to maintain its road over any river, provided it does not unnecessarily impair the usefulness and convenience of the river to the public, and provided that "It shall not be required to construct a draw in any bridge over and across any stream or bayou except streams navigable by enrolled and licensed vessels."

33 As the Atchafalaya river is navigable by enrolled and licensed vessels, it follows that, under the last provision, the complainant is required to establish and maintain a draw.

The bill is an injunction bill and falls under the head of bills to preserve a privilege from invasion from other parties.

The thing averred to be dangerous to the complainant's bridge, and which is sought to be enjoined, is the passing of any tow-boats through the draw at high water with more than two barges in tow.

It is clear that such a regulation of commerce cannot be enforced unless it has been authorized by the charter.

The charter makes the right to build the bridges to be conditioned upon its not impairing the usefulness and convenience of the stream to the public unnecessarily. According to the charter this question of unnecessary interruption of commerce must be negatived before the complainant can ask the court to grant any such injunction.

The bridge with its draw, as at present constructed, is clearly an interruption of commerce. Is it an unreasonable one? The bill avers that the bridge is lawful and complies with the statute authorizing it and that the draw is ample. This is the general statement; but the bill proceeds to state that the defendant, in a state of high water, desired and attempted to pass and did, with injury to the bridge, pass through the draw with six tows or barges, and to prevent a repetition of such attempt the injunction is asked.

This shows that the complainant, in order to preserve its bridge with the draw as now constructed, must have an interruption of existing commerce. Whether this is an unnecessary inter-

34 ruption or not will depend somewhat upon the ability of the complainant to reasonably make an ample draw. In other words, the question is whether the answer to the complainant's allegation of grievance is not this, "Enlarge your draw or obtain a more specific grant from the legislature."

The bill is admirably drawn and presents with completeness the complainant's rights. If the injury came from a trespass, outside of the prosecution of commerce itself the relief could be afforded. But the whole right of the complainant here to provoke any interference with the movements of defendant's boats, if it exists, springs

from such a state of facts as would compel the court to act upon the conclusion that, considering the commercial transportation over the railroad as compared with that upon the navigable stream, the interference was not unnecessary. Such an order, while it affects only parties, resembles a general regulation of commerce in this, that it is based upon a balancing of the public convenience of great thoroughfares of commerce. I think the claim of the complainant to such interference is one of those doubtful rights which, in the absence of more specific legislative designation, must, at least, be first established at law, when the defendant may have a trial by jury before the complainant can invoke the aid of injunction through the court of equity.

Let the demurrer be maintained.

35 Supreme Court of the United States.

THE TEXAS & PACIFIC RAILWAY COMPANY, Appellant,)
vs.
THE INTERSTATE TRANSPORTATION COMPANY, Appellee.)

On appeal from the circuit court of the United States for the fifth circuit and eastern district of Louisiana, holding sessions at New Orleans.

Assignment of Errors.

And now comes The Texas & Pacific Railway Company, appellant herein, and specifies & assigns the errors in the decree appealed from and in this cause, as follows:

1. The court below erred in sustaining the demurrer of the defendant.

2. The court below erred in dismissing the complainant's bill of complaint.

3. The court below erred in refusing the application for a rehearing.

4. The bill of complainant averring the bridge therein
36 described to be constructed according to law, and to be a lawful structure, and to be no obstruction whatever to navigation or commerce, and these averments being admitted by the demurrer to be true, the court below erred in considering the said bridge to be an interruption to commerce and that the complainant had not "negatived the question of unnecessary interruption."

5. The court below erred in considering that the decrees and relief prayed for by the complainant would resemble or amount to a general regulation of commerce.

6. The court below erred in holding that under the facts averred in the bill and admitted by the demurrer the complainant must first establish its rights at law before it could invoke the aid of an injunction through the court of equity.

37 And for these & other errors apparent on the record appellant prays that said decree be reversed, and for such other and further relief as may be just.

W. W. HOWE,
Of Counsel for Appellant.

February 21, 1891.

[Endorsed:] No. 11896. U. S. circuit court, eastern district of Louisiana. Filed Feb'y 24, 1891. E. R. Hunt, clerk.

Endorsed on cover: Case No. 14,999. E. Louisiana C. C. U. S. No. 395. The Texas & Pacific Railway Company, appellant, *vs.* The Interstate Transportation Company. Filed February 27, 1891.

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SUPREME COURT OF THE UNITED STATES.

October Term, 1893.

No. 395.

THE TEXAS & PACIFIC RAILWAY COMPANY,
APPELLANT,

versus

THE INTERSTATE TRANSPORTATION COMPANY, APPELLEE.

BRIEF FOR APPELLANT, COMPLAINANT IN THE COURT BELOW.

WILLIAM WIRT HOWE,
Of Counsel for Complainant, Appellant.

T. H. Thomason, Print, N. O.

SUPREME COURT OF THE UNITED STATES.

October Term, 1893.

No. 395.

THE TEXAS & PACIFIC RAILWAY COMPANY,
APPELLANT,

versus

THE INTERSTATE TRANSPORTATION COMPANY, APPELLEE.

BRIEF FOR APPELLANT, COMPLAINANT IN THE COURT BELOW.

STATEMENT OF THE CASE.

The bill of complaint in this case was dismissed in the lower court on demurrer for want of equity jurisdiction. It should be noted that the opinion of his Honor, Judge Pardee, found at pages 15 to 17 of the Transcript, although annexed by the Clerk, has no reference to the questions involved in this appeal. It was delivered on a motion for an injunction *pendente lite*. It assumes that the case made by the bill is within the equitable jurisdiction of the Court and pre-

sents a case for equitable relief. The injunction, *pendente lite*, was refused upon certain affidavits, which formed no part of the Record, or the Transcript, and are not here for discussion. A hearing on the merits, after examination and cross-examination of witnesses, would, we think, lead to a decree in our favor. The opinion on the demurrer, which is also annexed to the Transcript (pages 17 to 19), was rendered by his Honor, Judge Billings, the District Judge, sitting in the Circuit Court, January 16, 1891. The demurrer was filed January 2, 1891. A decree was entered January 16, 1891, sustaining the demurrer and dismissing the bill. The petition for rehearing was filed January 17, 1891, in which the complainant called attention to certain points in the Acts of Congress and other matters, and the decree of January 16, 1891, was *vacated*. After a further hearing, in view of the bill and the petition for rehearing, the decree now appealed from was rendered, *February 4th, 1891*, and is found at pages 11 and 12 of the Transcript.

The sole question then presented on this appeal is, whether, upon the *pleadings*, the court below was right in dismissing the bill for want of equity? It is elementary, that in the consideration of this question, all the allegations of fact made by the bill of complaint are taken to be true. Angle vs. Railroad Co., 151 U. S. Rep. 1 to 10.

We have, then, the following facts which cannot be disputed:

The Texas & Pacific Railway Company was organized and exists under a public Act of Congress, approved March 3, 1871, Chapter 122, and the various Acts supplemental to the same set forth in the bill. It acquired, in 1881, the railway, and the railway rights and franchises of the New Orleans Pacific Railway Company, a corporation created by a public Act of Louisiana, No. 14, of the Acts of 1876, certain portions of which will be printed in the appendix. Its main line of railway extends from New Orleans, Louisiana, to El Paso, Texas, and as part of it, it has its *bridge* across the Atchafalaya River, between the Parishes of Pointe Coupee and Avoyelles, in the State of Louisiana. This bridge had been built at an expense exceeding $300,000. The Atchafalaya River is wholly within the State of Louisiana. The bridge has a suitable draw of ample size, about 253 feet in the span, making a channel on each side of the center of the draw of 126 feet. (Transcript, page 2). The bridge is *not* an obstruction to navigation, is, in every respect, a legal structure, and is absolutely essential to the business of the complainant to enable it to perform its public duties. Any injury to the bridge, whereby it should be disabled for use by the complainant, would cut in two

the main line of the complainant's railway, and inflict irreparable injury on the complainant (page 3).

The defendant in the bill, the Interstate Transportation Company, owned and controlled certain towboats and barges on the lower Mississippi River and tributaries, the names of some of which are given in the bill, and was carrying on, for hire, the business of towing said barges loaded with coal and other very heavy cargoes. The Bill was filed at a very critical moment, on the 29th March, 1890. There was at that time, as a matter of history and pleading, a tremendous flood. Nothing more extreme or dangerous has ever been known in Louisiana. The water was unusually high in the Atchafalaya River, and with this extraordinary high water, came extraordinary currents and eddies, which accompany such a flood. One of the towboats of the defendant Company, while undertaking to pass through the draw of the bridge, which had been duly opened for it, struck with its tow of barges the bridge seat at the eastern end of the draw, injuring the same considerably, and came near disabling the structure for use, and inflicting on the complainant an injury greater in amount than *all the assets and property of the defendant Company.* This accident was caused by the attempt of the said towboat to carry through said draw upon the unusual flood waters of said river, more barges at one time

than could be safely and surely handled under such circumstances. The complainant at once notified the defendant Company of this affair, and warned it of the danger of such conduct, and the manifestly irreparable injury that would come from the same, if the bridge should become in anywise disabled. But the officers and agents of the defendant Company would make no effort to prevent the repetition of such conduct, nor give any assurance that such conduct and method, which were manifestly tortious and unlawful, would not be repeated (p. 3). Within a week before the filing of the bill, while, without any fault of the complainant, the flood waters of the river were still higher, and the current still swifter and more dangerous, the same towboat of the defendant, or another of its towboats, passed, or attempted to pass, through the draw with *six barges in one tow*, threatening to strike and destroy said bridge, and this at a time and emergency when none of the towboats of the defendant Company had power to control and guide such a tow in such a flood, or any tow exceeding *two barges*.

It further appeared by the bill (page 3), that at the extraordinary high water prevailing at the time it was filed, it was dangerous and unnecessary, and, therefore, claimed to be unlawful and tortious, for the towboats of the defendant Company to pass through the said draw with more than *two* barges in tow. That

while said draw was of ample width for all the navigation of said steamboats, yet, if the defendant Company, for its own convenience and profit, should undertake to carry through more than two barges at a time, by the use of one towboat, the high water and currents could, or might at any moment, swing the long tow in a direction *across* the opening of said draw and tend to strike and destroy the bridge. That in case the bridge should be disabled, the loss and injury could not be compensated by actions and damages at law, nor could the defendant Company respond to the judgments at law for the great injury which would be caused by the disabling, or the destruction of the bridge and the suspension of the complainant's main line. That such injury would be irreparable, and would disable the complainant from performing its duties to the public, as well as to its stockholders, and that the injunction prayed for was necessary to prevent a multiplicity of suits and irreparable injury.

It was further averred and, of course, admitted by the demurrer, that the said high water, the violent currents and flood still continued, and might increase, and would exist for a long time, and were of a very unusual and serious character, and that the towboats of the defendant Company had not power to safely guide, each, more than *two* of said barges at a time, and that the extraordinary floods, lifting them and

their tows above the piers, and so that in case of collision they would strike the framework of said bridge, rendered the situation one of unusual emergency and extreme and instant danger, which urgently required the relief prayed for. The relief prayed for was an injunction restraining the defendant Company, *during the high water in question*, from passing any towboat through the draw with more than *two barges* in tow of said boat, and from, in any way, striking or injuring the bridge (page 4).

In the petition for rehearing (page 10), which was considered by the court before the decree was made sustaining the demurrer, attention is called to the fact that the railroad of the complainant is a military and post road of which the bridge formed a part, and was being operated as such.

The demurrer of the defendant is found at pages 8 and 9 of the transcript, and as far as we are able to understand, it raises the point, that the cause is not one of equity jurisdiction. As already stated, after this demurrer was sustained, a rehearing was granted, and on that rehearing a decree was made February 4, 1891, dismissing the bill for want of equity jurisdiction.

Upon motion in open court, at the same term, an appeal was granted to the Supreme Court of the United States from the final decree, and of the cause,

and the appellant filed the following assignment of errors:

ASSIGNMENT OF ERRORS.

1. The court below erred in sustaining the demurrer of the defendant.

2. The court below erred in dismissing the complainant's bill of complaint.

3. The court below erred in refusing the application for a rehearing.

4. The bill of complainant, averring the bridge therein described to be constructed according to law, and to be a lawful structure, and to be no obstruction whatever to navigation or commerce, and these averments being admitted by the demurrer to be true, the court below erred in considering the said bridge to be an interruption to commerce and that the complainant had not "negatived the question of unnecessary interruption."

5. The court below erred in considering that the decrees and relief prayed for by the complainant would resemble or amount to a general regulation of commerce.

6. The court below erred in holding, that under the facts averred in the bill, and admitted by the demurrer, the complainant must first establish its rights at law before it could invoke the aid of an injunction through the Court of Equity.

ARGUMENT.

It is respectively submitted, that the decree of the lower court should be reversed. The pleadings show a case of equity jurisdiction of merit and importance.

I.

It is conceded by the demurrer that the Texas & Pacific Railway Company having all the rights and powers granted to it by the various Acts of Congress, set forth in the bill of complaint, as well as the rights and powers acquired by purchase of the railway and railway franchises of the New Orleans Pacific Railway Company, incorporated under Act No. 14 of the Acts of 1876 of the General Assembly of Louisiana, has established its line of railway from New Orleans to El Paso, Texas, and that its line forms an important and comprehensive medium of interstate commerce, for United States mails and troops, as well as for passengers and freight.

It is conceded by the demurrer, that the complainant has, as a part of its main line of railway, between New Orleans and El Paso, Texas, a certain bridge across the Atchafalaya River built at great expense, of a value far exceeding $300,000, which is a structure erected according to law, and in accordance with the special legislation of the State, and especially Act No. 14 of 1876 of the General Assembly of Louisiana, a public Act, of which a portion is printed in the ap-

pendix of this brief; and that this river is wholly within the State of Louisiana.

It is further admitted by the demurrer, that this bridge has a suitable draw of *ample size*, being about 253 feet in span, making a channel on each side of the center of the draw of 126 feet.

It is conceded by the demurrer, that this bridge *is not an obstruction to navigation*, and is in every respect a legal structure, and is absolutely essential to the business of the complainant, and to enable it to perform its public duties.

It is conceded by the demurrer, that any injury to the bridge, whereby it should be disabled for use, would cut in two the main line of the complainant's railway, and inflict on the complainant *irreparable injury*.

It is conceded by the demurrer, that during the extraordinary flood of 1890 one of the defendant's towboats had already collided with the bridge, and had injured it considerably, and had come very near disabling the structure for use, and inflicting on the complainant an injury greater than all of the assets and property of the defendant Company.

It is conceded by the demurrer, that this accident was caused by an attempt on the part of one of the defendant's towboats to carry through the draw *more barges at one time than could be safely*

and surely handled under the circumstances, and it is conceded that the defendant was notified of this affair, and warned of the danger of such conduct, and the manifestly irreparable injury that would result if the bridge should be disabled; and that the officers and agents of the defendant Company would make no effort to prevent a repetition of such conduct, nor give any assurance that it would not be repeated; and on the contrary, during the week prior to March 29, 1890, when the flood waters of said river were still higher, and the current still swifter and more dangerous, one of the defendant's boats had been passing, or attempting to pass, through the said draw with *six barges in tow*, threatening to strike and destroy the bridge, and this at a time of emergency, when none of the towboats of the defendant Company had sufficient power to control and guide such a tow with safety, or any tow exceeding *two barges*.

Such reckless conduct might well be considered to be general malice; a disregard of the rights of others.

It is conceded by the demurrer, that at the time the bill was filed, it was dangerous and unnecessary for the towboats of the defendant Company to pass through the draw with more than *two barges* in tow; that while the draw is of sufficient width for all navigation of the stream, yet, if the defendant Company

for its own convenience and profit undertook at such high water to carry through more than two barges at a time, the currents might at any moment swing the long tows across the opening of the draw, and tend to strike and destroy said bridge.

It is further conceded by the demurrer, that, in case the bridge should be disabled, the loss and injury *could not be compensated by actions for damages at law;* nor could the defendant Company respond to judgments at law for the great injury which would be caused by the disabling and destruction of the bridge and the suspension of the complainant's main line; that said injury would be irreparable, and would disable the complainant from performing its duties to the public, as well as to its stockholders; that an injunction is necessary to prevent a multiplicity of suits and irreparable injury, and that the matter in controversy exceeds the sum of $100,000.

It is further conceded by the demurrer, that the high water and violent currents and floods still continued at the time the bill was filed, and might increase and would exist for a long time, and were of a very violent and serious character, and that the towboats of the defendant Company had no power to safely guide, each, more than *two* of their barges through the draw of the bridge at a time, and that the extraordinary floods, lifting them and their tows

above the piers, and so that in case of collision they would strike the frame work of said bridge, rendered the situation one of *unusual emergency, and extreme and instant danger.*

There are thus presented in this case a number of equities; an admitted prospect of irreparable injury; an admission that such injury could not be compensated by actions for damages at law; that the defendant Company would be utterly unable to respond and pay the damages which would be inflicted if the bridge should be disabled; and we have also the equity of a multiplicity of suits. How, under the circumstances, it could be said that there was no equity for an injunction, and that the defendant must have a trial by jury, on the law side of the Court, before it could invoke the interference of a court of equity, is something impossible to be understood.

II.

The Atchafalaya river is conceded to be wholly within the State of Louisiana, and there can be no dispute as to the right of the State of Louisiana to have authorized the construction of the bridge in question. This was settled in the case of Cardwell vs. the American Bridge Co., 113 U. S. 205-208.

It is furthermore conceded by the defendant, that the bridge is a structure erected according to law, and in accordance with the legislation cited and set forth in

the bill of complaint; that the bridge is not an obstruction to navigation, and is in every respect a legal structure, and is absolutely essential to the business of the corporation.

It is conceded by the demurrer that the bridge has a suitable draw of ample size. Under these circumstances, the criticisms of the lower Judge, found at page 18 of the Transcript, in his opinion maintaining the demurrer, do not seem to be well founded. The lower Judge seems to have laid stress upon the fact, that under the provisions of the Act No. 14 of 1876, page 31, paragraph sixth, the Railway Company in building such bridge, is required not to impair the usefulness of the stream to the public unnecessarily. The opinion seems to declare, that the bill ought, in so many words, to have denied the unnecessary interruption of commerce. We submit, with due respect, that this criticism of the lower Judge is purely verbal. When a stream is wholly within the State of Louisiana; when the power of the General Assembly of that State to authorize its construction is not disputed; when it is conceded by the defendant that the structure has been erected according to law, and in accordance with the special legislation set forth in the bill, and especially with the Act No. 14 of 1876; when it is conceded that the bridge has a suitable draw of ample size, and when it is conceded that the bridge is *not* an

obstruction to navigation, and is in every respect a legal structure, it seems to us plain, that any possibility of its impairing the usefulness of the watercourse to the public unnecessarily, is excluded, *ex vi terminorum*.

III.

It is averred in the bill of complaint and admitted by the demurrer, that under the extraordinary conditions existing at the time the bill was filed, and for some time before, and which were likely to continue for some time thereafter, the towboats of the defendant Company had not sufficient power to handle with safety more than *two barges* each, at a time, in passing through the draw. It is averred in the bill and conceded by the demurrer that the bridge was in every respect a legal structure; that it was erected according to law; that it had a suitable draw of ample size, and was not an obstruction to navigation. It is certain that the extraordinary flood, with its extraordinary currents and eddies, was not caused by any fault of the complainant, but was, in the terminology of the Common law, an act of God, or, in the language of the Civil law, the result of *vis major*.

These conditions, we submit, presented beyond doubt a plain ground for applying the doctrine of that fundamental maxim of the law, *Sic utere tuo ut alienum non lædas*. This maxim is one of universal jurispru-

dence. It is true the defendant Company has the right to navigate the Atchafalaya River with its towboats and such barges as those towboats could handle with due regard to the rights of others, but the admitted facts of the bill of complaint show a case where the defendant is insisting upon exercising this right in such a way as to injure the rights of the complainant. It is a case where two rights cross each other. The defendant has a right to navigate the stream, the complainant has a right to bridge it with a draw-bridge, and each right is to be exercised in such a way as not to injure the other. The maxim above quoted must be construed with reference to the rights of all parties. Platt vs. Thompson, 15 Johnson (N. Y.) 218.

The right of the defendant to navigate the stream, does not necessarily include the right to put six barges in one procession, and then with a towboat of inadequate power, undertake to tow this fleet through our draw, under the circumstances and at the risks described in the bill of complaint. The presence of extraordinary dangers and complications, created without our fault, may easily modify the method in which a right should be exercised. A man may have the right under the general law and city ordinances to drive a coach and six at the rate of six miles an hour through a public street, but if by some cancatenation of circumstances, as a heavy snow fall,

the street becomes temporarily blockaded with wagons and drays, he certainly would not have the right to drive through the crowd at the rate of six miles an hour at the manifest risk of injuring the property or the lives of others.

There are cases in our common law States, where it has been held that the right of property must not be used for the purpose of injuring one's neighbor.

See Flaherty vs. Moran, 45 Northwestern Reporter, 381; Kirkwood vs. Finegan, 55 *Id.*, 457; Burke vs. Smith, 37 *Id.*, 838.

It might well be held that the conduct of the defendant in the premises exhibits a reckless disregard of the rights of others, which is the very definition of "general malice." It is the kind of conduct which would in certain cases sustain a charge of crime.

The stream in question being a Louisiana stream, the defendant being a corporation of Louisiana, and the bridge being erected under the authority of the State of Louisiana, the question of right in this case might well be determined under the Civil Law, which is the basis of jurisprudence in Louisiana, in these matters.

Under the Civil Law, while no one is responsible for damages for a prudent and proper exercise of a right, yet, he may be liable in damages, or subject to injunction, for the improper, imprudent, reckless or unneces-

sary use of his own right in such a way as to injure his neighbor, or transgress the right of such neighbor.

In the valuable work of Mr. Larombière, on Obligations, Vol. 5, page 692, No. II, the learned author, who was President of the Imperial Court of Limoges, says:

(Translation). "In the meantime, in order that an entire and perfect freedom from responsibility may be guaranteed in the exercise of a right, it is necessary that the person who exercises it should use it prudently, and with ordinary precaution, without abusing it, and without exceeding its just limits. Any abuse which he may perpetrate in respect to it in a manner prejudicial to another, will bind him to repair the damage thereby caused. With still more reason will he be held liable if, among the different methods of exercising his right, he has wilfully and with a design to injure, chosen that method which might be the more injurious. Malice would then be more than a tort, and would not merit any indulgence at all."

The admitted allegations of the bill put the defendant far within the rules laid down by Larombière.

Its boats not having the power, each, to handle safely more than two barges, it yet insisted on passing through our draws with six barges in tow of a boat of this description. It was wilfully insisting on the

exercise of a general right of navigation in a manner excessive, abusive, exorbitant and injurious.

IV.

The lower court erred in finding, p. 18, that "the bridge with its draw, as at present constructed, is clearly an interruption of commerce." The precise contrary of this proposition is averred, as matter of fact, in the bill, and admitted by the demurrer. These averments have been recited above, and need not be repeated.

V.

The lower court erred in holding, p. 19, that the injunction asked for would resemble a general regulation of commerce. We do not ask for anything but this: That the defendant should be restrained from inflicting irreparable injury on our property by an improper, excessive, reckless, wilful and unnecessary use of its own. We are not aware of any law which gives a towboat the right to use a stream in such a way as to destroy the admitted and equally important right of another to cross that stream, and we are not asking the Court to legislate, but only to declare and preserve as between the litigants, certain conceded rights, which belong to us.

VI.

It seems plain, then, that the theory of the lower court, that we must, in such an emergency as that

presented by a great flood, go on the law side of the Court, and sue for damages before a jury, and then, after doing that with success, present a bill for an injunction, is profoundly erroneous. The sudden and transitory character of a spring flood, the imminent danger of irreparable injury, the conceded inability of the defendant to answer for damages if the bridge were disabled, the slow process of a suit on the law side, the prospect of a multiplicity of similar suits between the same parties, all combine to illustrate the utter inadequacy of such an action at law.

We ask that the decree be reversed and the cause remanded for further proceedings.

Respectfully submitted,

WILLIAM WIRT HOWE,

Of Counsel for Complainant, Appellant.

APPENDIX.

Extract from Act No. 14 of 1876, of the General Assembly of Louisiana:

Sixth: To construct and maintain its said railroads, or any part of the same, and to have the right of way therefor across or along, or upon any *waters, water courses, river*, lake, bay, inlet, street, highway, turnpike or canal within the State of Louisiana, which the course of said railways may intersect, touch or cross; provided, the said company shall preserve any water course, street, highway, turnpike or canal which its said railways may so pass upon, along, or intersect, touch or cross, so as not to impair its usefulness to the public unnecessarily, or if temporarily impaired in and during the construction of the said railroads, the said company shall restore the same to its former state, or to such a state that its usefulness and convenience to the public shall not be unnecessarily impaired or injured, and the said company shall not be required to construct a draw in any bridge over and across any stream or bayou, except streams navigable by enrolled and licensed vessels, and when required by law.

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CLERK.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1894.

No. 95.

THE TEXAS AND PACIFIC RAILWAY COMPANY,
Appellant,

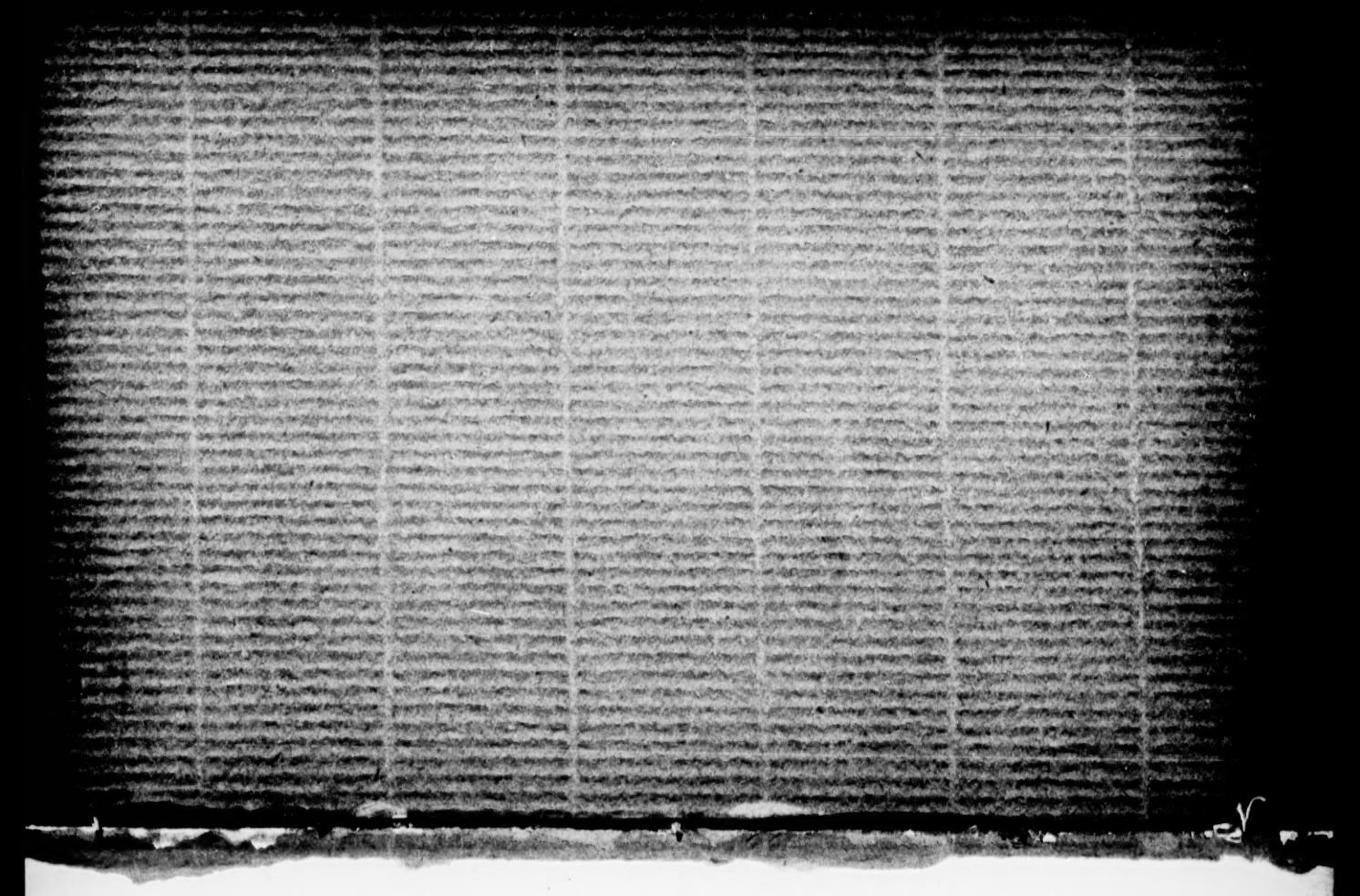
vs.

THE INTERSTATE TRANSPORTATION COMPANY.

BRIEF FOR APPELLEE.

CHARLES W. HORNOR,
GEORGE A. KING,
GUY M. HORNOR,
Solicitors for Appellee.

H. L. McQUEEN, Printer.



IN THE

Supreme Court of the United States.

October Term, 1894.

The Texas and Pacific Railway Company, Appellant, v. The Interstate Transportation Company.	No. 95.

BRIEF FOR APPELLEE.

On the 29th of March, 1890, the Texas and Pacific Railway Company filed in the Circuit Court of the United States for the Eastern District of Louisiana, its bill of complaint against the Interstate Transportation Company.

The object of the bill was to obtain an injunction against the Interstate Transportation Company from passing any tow-boat through the draw of the bridge of the Texas and Pacific Railway Company over the Atchafalaya River at high water with more than two barges in tow, or from in any way striking or injuring the said bridge.

The case was heard upon a demurrer to the bill, and on the 4th of February, 1891, the court entered the following decree, pp. 11 and 12:

"It is now ordered, adjudged, and decreed, for the reasons assigned in the opinion filed January 16, 1891, that the

said demurrer be, and the same is hereby, maintained and the bill dismissed with costs without prejudice to complainant's right to institute any action it may have at law."

The appellee invites the attention of the court to the form of this decree as affecting its appellate jurisdiction. That jurisdiction is by law confined to the review of final judgments and decrees (R. S. sec. 692, as modified by act of 1875, February 16, sec. 3, 18 Stat. L. 315, 316). These terms have always been construed as requiring that a judgment or decree to be final "must terminate the litigation between the parties on the merits of the case." "If the judgment is not one which disposes of the whole case on its merits it is not final." *Bostwick* v. *Brinkerhoff*, 106 U. S. 3, 4. Whether a decree like that entered in the present case, which leaves the whole matter in controversy at large to be re-litigated between the same parties, and it may be in the same court, is a final one is a question which is merely suggested by the appellee, but upon which its counsel do not feel called upon to submit a formal motion, or an extended argument.

Under an authority granted in general terms by the legislature of Louisiana to the New Orleans Pacific Railway Company, the predecessor in interest of the present complainant, to construct its railroad across any river within that State, the complainant claims the right to build a bridge across the Atchafalaya River with a draw of sufficient size to admit of the passage of a steam towboat having a limited number of barges in tow. If more than that number can not be passed through in safety, then, according to the theory of the bill, navigators are required to conform, so far as regards the size of their tows, to the width of the draw which the railroad company has seen fit to place in the bridge.

It is admitted that the sole question now before the court is whether upon the pleadings the court below was right in dismissing the bill. And it is also admitted that in the consideration of this question the allegations of fact contained in the bill must be regarded as true.

It is a qualification of this rule, however, that the facts admitted are only such as are well pleaded. As the rule was expressed in *Dillon* v. *Barnard*, 21 Wall. 430, 438, "A demurrer only admits facts well pleaded; it does not admit matters of inference and argument however clearly stated; it does not admit, for example, the accuracy of an alleged construction of an instrument, when the instrument, itself is set forth in the bill, or a copy is annexed, against a construction required by its terms; nor the correctness of the ascription of a purpose to the parties when not justified by the language used. The several averments of the plaintiff in the bill as to his understanding of his rights, and of the liabilities and duties of others under the contract, can, therefore, exert no influence upon the mind of the court in the disposition of the demurrer."

Applying this rule to the bill in this case, the allegation that the tow-boat *Lambert* of the defendant company, while undertaking to pass through the draw, which had been opened for it, struck with its tow of barges the bridge seat at the eastern end of the draw, and injured the same considerably, and that although the complainant notified the defendant of the affair, and warned it of the danger, the officers and agents of the defendant company would give them no assurance that such an act would not be repeated, and that within the last week before the filing of the bill the said *Lambert*, or other of the defendant's boats, has been passing, or attempting to pass through, the draw with six barges in one tow, are undoubtedly admitted by the demurrer. The statements in the bill, however, which are mere conclusions of the pleader from the facts

stated, such as that the accident was caused by the attempt of the tow-boat to carry through the draw more barges at one time than could be safely and surely handled under the circumstances, or that it was dangerous and unnecessary for the tow-boats of the defendant company to pass through the said draw with more than two barges in one tow, or that the loss and injury in case the bridge should be disabled could not be compensated by action and damages at law, can not be regarded in the light of facts well pleaded, nor held to be admitted by the demurrer.

The court below sustained the demurrer of the defendant to this bill upon two grounds, stated in the opinion of the late Judge Billings, who presided at the hearing.

1. That the right of the complainant is one of those doubtful claims which must be first established at law before he can invoke the aid of an injunction through a court of equity.

2. That for a court of equity to interfere at this stage by injunction would amount in substance to the establishment of a general regulation of commerce as to the mode of navigation of the Atchafalaya River.

On both grounds it is submitted the decree can be amply justified.

In *Earl of Ripon* v. *Hobart*, 3 Mylne and Keen, 169, as cited in note to 1 Story's Equity Jurisprudence, section 924, a, note 1, Lord Brougham said:

"If the thing sought to be prohibited is in itself a nuisance, the court will interfere to stay irreparable mischief without waiting for the result of a trial; and will, according to the circumstances, direct an issue, or allow an action, and, if need be, expedite the proceedings, the injunction being in the meantime continued. But, where the thing sought to be restrained is not unavoidably and in itself noxious, but only something which may according to circumstances prove so, then the court will refuse to interfere, until the matter has been tried at law, generally

by an action, though in particular cases an issue may be directed for the satisfaction of the court, where an action could not be framed so as to meet the question. The distinction between the two kinds of erection or operation is obvious, and the soundness of that discretion seems undeniable, which would be very slow to interfere, where the thing to be stopped, while it is highly beneficial to one party, may very possibly be prejudicial to none. The great fitness of pausing much before we interrupt men in those modes of enjoying or improving their property, which are *prima facie* harmless or even praiseworthy, is equally manifest."

So, too, Mr. Bispham, in his Principles of Equity, section 440, thus states the rule, citing numerous authorities:

"Now if the complainant's legal right is admitted, or if it be clearly established, then his right to an injunction is plain. But if it is manifest that the complainant has no legal right, the injunction must be refused. If the case falls between these two—that is to say, if the complainant's title is doubtful—the ordinary rule is not to interfere until his title has been established at law."

The application of these principles to the present case is obvious. As this bridge seems to have been authorized by legislative act of 1876, it must have been built not long afterwards,—certainly by 1881, when the railroad of the New Orleans Pacific Railway Company, of which it formed a part, was acquired by the complainant. Although the complainant was thus in possession of the structure at least nine years before the filing of its bill, and although the bill contains no averment showing that six barges is at all an unusual tow, there is no allegation of more than a single accident to the bridge by reason of undertaking to carry more than two barges in tow at one time; and even as to that there is no distinct statement of the amount of damage, but only the very

general averment that the tow-boat complained of "injured the same considerably, and came near disabling the structure for use and inflicting on your orator an injury greater in amount than all the assets and property of the said defendant company."

It would certainly seem, too, that in the four years which have now elapsed since the filing of the bill the complainant corporation might easily and promptly have brought its action at law, as suggested by the court below, and have obtained a judgment sustaining its right, thus leaving a sure and safe foundation for a subsequent application to the Circuit Court for the exercise of its equity powers by injunction.

So, too, as suggested by the learned court below, the award of an injunction in this case would be in spirit, if not in form, the establishment of a general regulation of commerce. It would affect not merely the right of the defendant corporation to pass through this bridge with more than two coal barges in tow, but its mode of navigation of the Atchafalaya, and possibly other rivers, generally. It would hardly be possible for it to thus limit the number of barges in tow when going through the draw of this particular bridge, and yet run with more barges through the course of the rest of the river. Must it on arrival at this bridge with a tow-boat carrying six barges throw off four of them, and pass through the draw of the bridge with the remaining two and then come back, take two more through, and go back for the last two? Manifestly such navigation would be utterly impracticable, and a decree enjoining this defendant from passing through the complainant's bridge with more than two barges would in effect be a decree enjoining the free navigation of the Atchafalaya River at all with more than two barges. Not only would it enjoin this defendant from so navigating that river, but as precisely the same prin-

ciple would apply to all other navigators it would in effect amount to a general regulation affecting all steam navigation on that river. Indeed, it is not clear how its effect could be limited to that single river, as the same principle which would permit a railroad company thus to limit the navigation of this river by obtaining from a State legislature general permission to build bridges would equally avail to permit the same thing to be done on all other rivers. Manifestly it is for Congress to prescribe such a regulation of commerce if it is desirable that one be made.

In order to reach a conclusion that the decree of the Circuit Court should be affirmed it is not necessary for this court to go further than to hold, as did that court, that the claim of the complainant is at best of that doubtful character which requires to be first established by a verdict and judgment at law before a court of equity can interfere by injunction; and also that to grant the injunction in this case would be equivalent to making a general regulation of commerce, a duty to the performance of which Congress is alone constitutionally competent.

It may be, however, that the court will deem it more satisfactory to dispose of the case on broader grounds than those assigned by the learned judge who delivered the opinion of the Circuit Court. With this contingency in view the appellee begs leave to submit some observations bearing more directly upon the respective rights of the complainant and the defendant.

We submit that the bill shows upon its face that the defendant is exercising nothing more than the common right of navigating the river. Nay, more, we go further, and contend that the bridge of the complainant is itself an unlawful obstruction to the navigation of the stream, and that the complainant is itself the real aggressor upon the rights of the defendant.

There can be no question of the general principle that every person is bound so to exercise his rights as not to interfere with those of others. The question here, however, is not whether this is in itself a sound principle, but as to its application in this case. In other words, is the defendant exercising its right of navigating the river with a reckless disregard, as claimed, of the complainant's rights? Or, on the other hand, may it not with equal, or greater, justice be said that the complainant has so built its bridge as necessarily to constitute an interference with navigation, thus subjecting itself to the very inconvenience and dangers complained of in its bill, if not to a liability in damages to the defendant and other navigators of the river for an obstruction of the navigation?

It is here worthy of remark that there is not before the court, as there was in the case of *Cardwell* v. *American Bridge Company*, 113 U. S. 205, a case where the legislature has specially authorized the construction of a bridge without a draw; or, — as for example in many recent acts of Congress,—has authorized a bridge to be constructed with a draw of specified size.

Here the authority is a mere general authority to construct a railroad, with a general right conferred to cross water-courses, but with provisions that "the said company shall preserve any water-course, street, highway, turnpike or canal which its said railways may so pass upon, along, or intersect, touch or cross, so as not to impair its usefulness to the public unnecessarily, or if temporarily impaired in and during the construction of the said railroads, the said company shall restore the same to its former state, or to such a state that its usefulness and convenience to the public shall not be unnecessarily impaired or injured, and the said company shall not be required to construct a draw in any bridge over and across any stream or bayou, except streams navigable by enrolled and licensed vessels, and when required by law."

Under the terms of this act, the defendant is in a position to claim the most unrestricted right of navigation and to demand of the complainant corporation that in crossing this river it shall exercise every precaution known to the science of bridge-building to avoid obstructing the navigation of the stream. Has the complainant corporation done this?

It is a significant omission in its bill that nowhere is the width of the Atchafalaya River at this point mentioned. While the dimensions of the draw-bridge are given, it is not averred that it would be impossible to construct a bridge with a wider draw, nor is the court informed by anything in the bill as to what is the usual size of the tow of coal barges ordinarily carried by tow-boats on the Mississippi River or its tributaries. It is fair to presume, therefore, that the number of barges alleged to have been in tow at the time of the occurrence of the accident was not more than what are ordinarily carried by tow-boats on these rivers.

The court will probably take judicial notice of the character of these coal barges. They are mere temporary structures, built for only a single voyage, and sent from Pittsburg, or other points in the coal regions, down the Ohio and Mississippi Rivers. When the coal is sold, the barge is sold with it, and never returns to its port of origin. It must appear clear, therefore, that the bridge must be remarkably fragile if it is liable to be injured by the impact of one of these temporary and comparatively unsubstantial structures. It would naturally be supposed that a collision between a properly constructed bridge and a temporary barge of this character would do far more harm to the barge than could possibly be inflicted upon the bridge. The circuit judge in his opinion on the motion for injunction *pendente lite*, evidently took this view, for he was satisfied (p. 16) "that

the objection made by the defendant to the construction of the bridge as incomplete is well founded."

In many well-considered authorities it is laid down that in cases of conflict between the owners of bridges and those interested in the navigation of rivers doubts should always be resolved in favor of the right of navigation. This right existed beforehand, and the bridge owner must in the creation of his structure regard this existing right, and use the greatest care not to interfere with it (Gould on Waters, 388). Both courts and legislatures have from the earliest times strenuously endeavored to prevent this right from all embarrassment. To hinder the course of a navigable river was held by Holt, Chief Justice, in *Rex* v. *Clark*, 12 Modern, 615, to be against Magna Charta. All annoyances and impediments to navigation committed by either riparian owners or by other citizens are *prima facie* public nuisances. These annoyances and impediments are instanced by Lord Hale, as cited in Gould on Waters, section forty-two, under six heads, which need not here be enumerated.

In *Onslaer* v. *Philadelphia Company*, 31 Fed. Rep. 354, it was held that gas pipes laid on the bed of a navigable river constituted an actionable obstruction to navigation, and that to render them otherwise they should be buried beneath the surface of the river bed.

In *Commonwealth* v. *New Bedford Bridge*, 2 Gray, 339, 352, where the defendant's charter required it to construct its bridge with "suitable draws," it was held that the draws must be so constructed as to adapt them to the exigencies of navigation, not only at the time of the passage of the act, but for all future time. "If, therefore, by reason of the increase in size of vessels, or of a difference in their mode of construction, or from any other cause, it has become necessary to the convenient passage of the river, that the draws of the bridge should be en-

larged, the defendants are bound to adapt them to the present exigencies of navigation, and if they fail to do so they violate the duty imposed on them by the terms of their charter, and thereby cause an unlawful obstruction to a navigable stream."

Again in *Dugan* v. *Bridge Company*, 27 Pa. St. 303, it held that—

"A condition in a charter authorizing a company to build a bridge over a navigable stream, that it shall not 'injure, stop or interrupt the navigation' is not performed by building the bridge in such manner as to do as little injury as possible to the navigation, as it existed at the time the bridge was built.

"If the structure at any time during its continuance actually injures, stops or interrupts the navigation, it is unauthorized, and the company is liable to the party injured for the damages thereby sustained.

"The condition not to injure the navigation is not limited to the kind and amount of trade upon the stream at the time of the enactment, but extends to the increased business incident to the growth of the country and the expansion of commerce."

As was said in *Attorney-General* v. *Hudson River Railroad*, 9 N. J. Eq. 526, 558, 559—

"A grant in general terms to an incorporated company of authority to build a draw-bridge over a navigable river, always implies that the bridge shall be so constructed and the draw placed as to do the least possible injury to the navigation. The right of navigation is a pre-existing public right—and all grants of special privileges are to be construed strictly against the grantees and liberally in favor of the public; and he who claims authority to impair or obstruct this right by legislative grant, must show it by the clear and explicit terms of the grant itself or at least by necessary implication."

Blanchard v. *Telegraph Company*, 60 N. Y. 510, was an action for damages caused to a vessel by coming in con-

tact with a telegraph line laid in the Hudson River. It was said (pp. 513, 514):

"The Hudson River, at the point of the injury, is a public navigable stream, and those navigating it for commercial purposes and using it as a highway for vessels, have the primary and paramount right to it, and every interference with, or obstruction of the navigation, or hindrance to the free passage of vessels upon it, is *prima facie* a nuisance and unlawful. *People* v. *Vanderbilt*, 38 Barb. 282, affirmed, 26 N. Y. 287.

"In furtherance of commerce and travel slight obstructions, and such as may temporarily interrupt the passage of vessels, or occasion a cursory inconvenience, but which do not materially impair navigation are made lawful and tolerated by reason of the greater public good that results from these inconsiderable disturbances of the right of the public to the free and uninterrupted use of navigable streams. Upon this principle the bridging of streams, the building of wharves and other like acts are permitted, the necessary obstruction in every case being reduced to its minimum. If there is an unnecessary interference with the navigation the act becomes unlawful by reason of the excess of the limits within which obstructions are allowed in the interests of the public. *Mississippi & Missouri Railroad Co.* v. *Ward*, 2 Black, 485; *State* v. *Portland & Kennebec Railroad Company*, 57 Maine, 402; *Silliman* v. *Hudson River Bridge Company*, 11 Blatch, 395; *S. C.*, 1 Black, 582; 2 Wall. 403."

Accordingly it was held that a *prima facie* case was made against the defendant by proof of the vessel, in the course of her usual navigation, coming in contact with the defendant's cable and receiving injury.

The right to navigate the river is paramount to a ferry franchise. *Steamboat Globe* v. *Kurtz*, 4 G. Green, (Iowa), 433, 436, 437; quoted, Gould on Waters, Section 88.

Even against persons lawfully fishing in navigable waters the right of navigation is paramount. The master of a vessel is not even required to shorten sail, or yield the channel to a fishing net, but may lawfully prosecute his voyage or approach the shore at any point without regard to seines or nets drawn across the way. (Gould on Waters, section 87, with authorities cited.)

In *Cable* v. *Bennett*, 75 Pa. St. 326, it was held that the right of fishery, though an acknowledged right, is entirely subordinate to the rights of navigation, and that therefore a vessel can not be held liable for running down seines or nets, unless it be done wantonly.

The present application for injunction appears to be absolutely without precedent, and, while this may not be a conclusive circumstance against it, it goes far to show that the builders and proprietors of bridges have up to this time felt the necessity of standing on the defensive, and have never yet felt themselves in a position to invoke the aid of the courts in restricting navigation. Taking the statements of the bill in their most favorable light for the complainant, there is certainly nothing in the case to warrant the court in now departing from the beaten track and granting an injunction against the free and unrestricted navigation of the Atchafalaya River.

The bill, as remarked by the learned judge below in his opinion, is "admirably drawn, and presents with completeness the complainant's rights." If, therefore, we find omitted from it any allegation which might be reasonably expected to find a place there, we may feel sure that it was because it was impossible for the complainant truthfully to make such an averment. Looking at the bill from this standpoint we feel justified in claiming that it shows upon its face the careful exercise by the defendant of the usual and ordinary rights of navigation. It is nowhere claimed that the number of barges which the

defendant's steam-boat undertook to carry was unusual, or not in accordance with the ordinary custom of tow-boats navigating the Atchafalaya river and similar streams. Nor, on the other hand, is there any averment of unskillfulness, or want of care in navigating the steam-boat or handling her tow. The entire gist of the complaint is that the steam-boat took too many barges through the bridge-draw at one time, not that the conduct of the pilots or other officers of the defendant company was negligent, or in any manner tortious. Nor can it escape notice that in all the years that this bridge has been standing only a single accident of this character can be found, and that evidently a trifling one, as all that can be alleged about it is "that the defendant's tow-boat struck with its tow of barges the bridge seat at the eastern end of the draw of said bridge, injuring the same considerably, and came near disabling the structure for use," etc. Upon a subsequent occasion the complaint is made that "the said *Lambert*, or other of said defendant's boats, has been passing, or attempting to pass, through said draw with six barges in one tow, threatening to strike and destroy said bridge." But no allegation is made that the boat, or any of her barges in tow, or any other boat or barges, ever did, either before or after the accident of February 19, 1890, actually strike, or in any manner injure the complainant's bridge, or any part thereof. The fact that the accident in question stands solitary and alone, according to the complainant's own showing, is a strong circumstance to show that there is no such "unusual emergency, and extreme and instant danger" as can alone justify a court of equity in granting an injunction in a case of this character, where the right has not been settled by a verdict and judgment at law. *Truly* v. *Wanzer*, 5 How. 141; *Irwin* v. *Dixon*, 9 How. 10; *Parker* v. *Winnipiseogee Co.* 2 Black, 545; *Dainese* v. *District of Columbia*, 91 U. S. 580.

A careful examination of the bill discloses that its real theory is that no duty exists, or is imposed by law, upon those who build bridges over navigable streams so to construct them as not to interfere with the navigation of the river, but that, on the other hand, it is the duty of navigators to conform in the size of their craft and in the number to be navigated at one time to such requirements as the builders of the bridge may see fit to impose by the shape and size of the draw which they construct, or the material out of which they build the piers or supports of their structures. It was just such a theory as this which was repudiated by this court in the famous case of the Wheeling bridge (*State of Pennsylvania* v. *Wheeling and Belmont Bridge Company*, 13 How. 518). In this case the bridge over the Ohio River from Wheeling to Bridgeport was held to be a nuisance, and ordered to be abated as such, although only seven steam-boats out of two hundred and thirty plying the river had chimneys too high to enable them to pass under the bridge. This decision was based upon the exclusive power of Congress to control commerce and navigation, and their acts regulating navigation on the Ohio. The court repudiated the doctrine which had been enunciated in other cases that the lawfulness of such a bridge was to be ascertained by a comparison between the injuries and benefits it produced. "It is said that the interest of commerce requires navigable waters to be crossed, and that in such a case the inquiry should be, whether the benefit conferred upon commerce by the cross route, is not greater than the injury done. In the case of the *King* v. *Sir John Morris*, 1 Barn. & Adol. 441, it was held that the injury cannot be balanced against the benefits secured. And in the case of the *King* v. *George Henry Ward*, 4 Ad. & El. 384, it was held, where the jury found that an embankment complained of was a nuisance, but

that the inconvenience was counterbalanced by the public benefit arising from the alteration, it amounted to a verdict of guilty. If the obstruction be slight, as a draw in a bridge, which would be safe and convenient for the passage of vessels, it would not be regarded as a nuisance, where proper attention is given to raise the draw on the approach of vessels." "In all the charters, granted for the construction of bridges over navigable waters, it is believed all the States, not excepting Virginia, have provided that their navigation should not be obstructed." 13 How. 577, 578.

It is true that after this court had rendered its decree declaring the Wheeling bridge a nuisance, Congress expressly legalized it, and the court held that this rendered the bridge a lawful structure, though unlawful before. The court, therefore, dissolved the injunction previously granted and allowed the bridge to stand. 18 How. 421.

In this case all the legislation of Congress, so far as any purpose can be inferred from it, has been in the opposite direction. The original acts for the admission of Louisiana into the Union make it a fundamental condition upon which the State is incorporated in the Union, "That the river Mississippi and the navigable rivers and waters leading into the same or into the Gulf of Mexico, shall be common highways and forever free, as well to the inhabitants of the said State as to other citizens of the United States, without any tax, duty, impost or toll therefor, imposed by the said State" (2 Statutes, 642, 703).

Again Congress has appropriated large sums for the improvement not only of the Mississippi River itself, for the improvement of which a special commission has been created, called the Mississippi River commission (Act of June 28, 1879, 1 Supp. R. S. 268), but also of this very Atchafalaya river itself up to the head of navigation (23

Statutes at Large, 150; 25 Statutes at Large, 421; 26 Statutes at Large, 450; 27 Statutes at Large, 108).

It would be farcical for Congress to appropriate two hundred and fifty thousand dollars for improvements "at the head of the Atchafalaya and the mouth of Red River," as in the act of September 19, 1890, just referred to (26 Statutes at Large, 450, 451), if private persons, including even railroad corporations, were at liberty, even when authorized by State legislation, to stop up the stream by constructing bridges in such a manner as to prevent usual and customary navigation of the stream. Nor does the State legislation relied upon by the complainant authorize any such obstruction. After giving general authority to the railroad company to construct its road "upon any waters, water courses, rivers," etc. it provides that "the said company shall preserve any water-course, street, highway, turnpike or canal which its said railways may so pass upon, along, or intersect, touch or cross, so as not to impair its usefulness to the public unnecessarily," etc "and the said company shall not be required to construct a draw in any bridge over and across any stream or bayou except streams navigable by enrolled and licensed vessels, and when required by law."

It is true that this court decided in *Cardwell* v. *American Bridge Company*, 113 U. S. 205, that a State might even authorize the construction of a low bridge across a navigable stream and without a draw, provided both sides of the river were within the same State. This case was decided in 1885. It was perhaps in consequence of it that recent legislation has so carefully provided against any future obstructions of this character in any of the navigable waters of the United States whether within the limits of a single State, or flowing through or between two or more States. It is unnecessary, however, to recapitulate the provisions of these acts. They were

passed in 1888, 1890 and 1892, and will be found in 1 Supp. R. S. 610, 800 and 803, and 2 Supp. R. S. 30. One of them is referred to in the opinion of this court in the recent case of *Covington Bridge Company* v. *Kentucky*, 154 U. S. 204, 220. By the provisions of section four of the act of September 19, 1890, ch. 907, 1 Supp. R. S. 800, 801, it is enacted "That whenever the Secretary of War shall have good reason to believe that any railroad or other bridge now constructed, or which may hereafter be constructed over any of the navigable water-ways of the United States is an unreasonable obstruction to the free navigation of such waters on account of insufficient height, width of span, or otherwise, or where there is difficulty in passing the draw-opening or the draw-span of such bridge by rafts, steamboats, or other water-craft, it shall be the duty of the said Secretary, first giving the parties reasonable opportunity to be heard, to give notice to the persons or corporations owning or controlling such bridge so to alter the same as to render navigation through or under it reasonably free, easy, and unobstructed; and in giving such notice he shall specify the changes required to be made, and shall prescribe in each case a reasonable time in which to make them. If at the end of such time the alteration has not been made, the Secretary of War shall forthwith notify the United States district attorney for the district in which such bridge is situated, to the end that the criminal proceedings mentioned in the succeeding section may be taken."

By the provisions of this act the bridge in question is liable at any time to be proceeded against, for there is no question that by the very showing of the complainant's bill there was, in the language of the act, "difficulty in passing the draw-opening, or the draw-span of such bridge by rafts, steamboats or other water-craft."

Additional provisions, relative to the opening of draw-

bridges, and prescribing penalties for failing or refusing to open them, or unusual delaying to open them, are embraced in section five of the River and Harbor Appropriation Act of August 19, 1894, 28 Stat. L. 362, 363.

So far, therefore, as any settled legislative policy can ever be gathered from a series of enactments we are warranted in saying that it is the will of Congress that all navigable streams, and especially those tributary to the Mississippi River in Louisiana, shall remain in all ways entirely free and unrestricted.

The appellant in this case has mistaken its remedy. If its bridge by reason of insufficient width of draw is in danger from passing steamboats and their cargoes in tow, there can be no objection to its either enlarging the draw to a width which shall be sufficient to enable the largest water-craft navigating the river to pass through without difficulty, or to its building a sufficiently high bridge spanning the entire river without a draw at all. In the present state of the art of bridge-building—in the presence of such structures as the Brooklyn Bridge, with a single span of fifteen hundred feet reaching from bank to bank, or the bridge across the Niagara River, also with a single span twelve hundred feet long and one hundred and fifty feet high—it would be utterly idle to contend that there is any difficulty, or even any unreasonable expense, involved in constructing a draw-bridge with fully double the meager space of one hundred and twenty-six feet, allowed by the complainant's bridge for the passing of vessels. When, too, we find Congress passing a bill for bridging the North River, three thousand feet wide, with a single pier in the middle of the stream, and the President vetoing this same bill because even the one pier is too great an obstruction and the bridge should be built with a single span reaching from bank to bank, it can hardly be contended that Congress is willing that the

navigable streams of the country shall be closed up in the manner in which the complainant in this case would do it.

It is submitted that the decree of the court below was clearly correct, and should in all things be affirmed.

CHARLES W. HORNOR,
GEORGE A. KING,
GUY M. HORNOR,
Solicitors for Appellee.

Office Supreme Court, U. S.
FILED
NOV 30 1894
JAMES H. McKENNEY,

Supreme Court of the United States.

OCTOBER TERM, 1894.

No. 95.

THE TEXAS AND PACIFIC RAILWAY COMPANY,
Appellant,

against

THE INTERSTATE TRANSPORTATION COMPANY.

BRIEF IN REPLY.

JOHN F. DILLON,
For the Appellant.

C. G. Burgoyne, Walker and Centre Sts., New York.

Supreme Court of the United States.

OCTOBER TERM, 1894.

No. 95.

THE TEXAS AND PACIFIC RAILWAY COMPANY,
Appellant,

AGAINST

THE INTERSTATE TRANSPORTATION COMPANY.

BRIEF IN REPLY.

JOHN F. DILLON,
For the Appellant.

I.

The bridge in question is authorized by legislative authority.

The bridge in question was expressly authorized by the legislative charter of the plaintiff to be constructed over a river wholly within the State of Louisiana. (*The text of the act in this respect is given in the Appendix to Judge* HOWE'S *Brief, p. 21.*) The competency of the legislative act is unquestionable.

Cardwell vs. The Am. Bridge Co., 113 U. S., 205–208.

It is not questioned by the opposing counsel. The authority was not general but specific, being contained in the special charter of the plaintiff company, authorizing a line of railroad which *required the crossing of this very river*, and therefore contemplated the erection of the bridge.

Springfield vs. Conn. River R. R. Co., 4 Cush., 63.

Clinton vs. Cedar Rapids, &c., Co., 24 Iowa, 455, 480.

The legislative authority to built it is absolute. The only restriction is that it shall not injure unnecessarily —that is, unreasonably—the usefulness and convenience of the river to the public. The bridge has been in existence since 1881, and the lawfulness of the structure has not been questioned by the State or the United States, or in any civil action or suit at the instance of private parties.

II.

On the averments of fact in the bill of complaint the bridge is a lawful structure.

To a discussion of this subject I cannot add anything to the full and clear presentation thereof in the brief of my associate, Judge HOWE. Any extended reference to it, if needful, will be made at the bar.

The allegations as to the lawfulness of the structure are direct, specific and positive allegations of *fact* (Record, pp. 2, 3, 4), and not of inferences, arguments and conclusions as suggested by opposing counsel.

Where the defendant, instead of meeting the bill by answer, meets it by a general demurrer for want of equity, the bill is to be fairly regarded and construed in its substance and intent; and not whittled down by hostile construction, such as that it omits (as suggested by the defendant's counsel in their brief) to state the width of the river, or to aver that it was impossible to construct the bridge with a wider draw, or to describe the usual size of the tow of coal barges, the size and character of such barges, and the like. None of the suggested allegations are necessary, and some of them would be improper.

III.

Taking the allegations of fact in the bill respecting the character of the bridge and the threatened injury thereto by the defendant to be true, it follows that if the threatened injury had been carried out, the plaintiff would have had an action at law for damages.

The damage or destruction of the bridge thus caused would come within every definition and embrace every legal element of a tort, either in the civil or common law. By the French Civil Code a "delict" is an act of one man which causes damage to another, provided that act be done intentionally, negligently or imprudently. ("Art. 1383: *Chacun est responsable du dommage qu'il a causé, non seulement par son fait, mais*

encore par sa négligence, ou par son imprudence") Markby, Elements of Law, 4 Ed., Sec. 669.

If our bridge had been damaged the act would have been what our law calls a "trespass" to property. It is a simple case of violation of rights of ownership, and "every violation of a right of ownership," says Markby (*Ib.*, Sec. 697), "which causes damage, gives rise to a liability to make compensation to the owner for the damage done, and is a tort."

"The occasions upon which a person will be liable for rashness or negligence are chiefly occasions on which he and other persons are brought into contact in the exercise of their common rights; as, for example, when he and others are using a common road. In these and other cases the law says that if damage is caused by a certain want of attention to consequences which amounts to heedlessness, or by want of caution in avoiding danger, which amounts to rashness, it must be compensated" (Markby, Sec. 707).

Much more clearly is there a liability when, as in this case, the defendant after having once injured our bridge in this flood, disregards our warning and insists upon his supposed right to damage, imperil and possibly destroy our bridge.

The case made by the bill is the common case of co-existing and competing rights and relations. This aspect of the case is well presented in Point III. of Judge Howe's brief (pp. 15-19).

The plaintiff's bridge was a lawful structure, and must be respected as such by vessels navigating the river. This is, I grant, a very difficult thing for steamboat owners or masters to do, for they are the natural enemies of all railroad bridges, nevertheless they should be made to understand that the law requires it. The defendant had the right of navigation, but within the

limits of the plaintiff's rights, which was to own, possess and enjoy its bridge, it is a mistake to suppose, as argued by his learned counsel, that the defendant's right is paramount and superior to the plaintiff's.

The argument for the defendant when carefully scrutinized will be found to be based upon two mistakes: 1. That the plaintiff's bridge, despite its full and specific allegations to the contrary, was an unlawful structure because it unnecessarily obstructed the navigation of the river.

As to this the demurrer to the bill *speaks*, but of course speaks to no purpose.

The learned Judge below fell into this error in basing his opinion and decree upon the assumption in the teeth of the precise allegations of the bill to the contrary that the defendant's bridge "is clearly an interruption of commerce," and an "unnecessary" interruption of it (Record, p. 18).

This is the exact—the precise fact—which we wish to have decided upon the proofs.

2. That our bridge, being a public nuisance, and the defendant having the unrestricted right of navigation, was not bound to regard the unusual, extreme, extraordinary and violent flood then existing, and, in the exercise of the right of navigation, had the right to attempt the passage of the draw, with its long, unmanageable and dangerous procession of coal barges in tow, even though it not only imperiled, but would likely destroy, the plaintiff's bridge and interrupt the cross-commerce of the country. What each party had at risk was very unequal. The defendant would only be temporarily required to limit its tow to its power to control it—a small inconvenience at best. On our side our bridge

and the commerce and business of a long line of railway was at risk.

No matter what the extent of danger and damage to the plaintiff, and the consequent inconvenience to the public of a destruction of the plaintiff's bridge, the defendant insists that the tremendous and violent flood did not modify its rights, and that it had the right to tow six barges or sixty if it saw fit to do so. This is a mistake. It asserts a principle which shocks the sense of justice and right of everybody but a navigator of steam vessels.

Even if it were admitted that the draw of the bridge was too narrow or that the bridge itself was not sufficiently protected or sufficiently solid or was otherwise defective (which is the question the bill puts in issue), we deny that this would give the defendant the right which seems to be claimed by it, to treat the bridge as if it were a wild beast, and to run it down and destroy it. The law affords peaceful and effectual remedies in such cases, and does not arm the defendant with the asserted power of destruction, or justify it in its reckless disregard of our rights.

Yates vs. Milwaukee, 10 Wall, 497, 505.
Garrett on Nuisances, pp. 314, 315.

THE EXISTENCE OF AN EXTRAORDINARY FLOOD, extreme and dangerous beyond precedent, fully set forth in the bill, is a capital and controlling feature of the case.

No Regulation of Commerce Sought.

The bill was based upon the special and temporary exigency created by the existing flood and the defendant's conduct, and the relief sought was limited in extent and duration accordingly. This seems to

have been overlooked by the learned Judge below, else he could not have fallen into the error (Record, pp. 18, 19) that the granting of the injunction asked would amount to a "GENERAL REGULATION OF COMMERCE," which is a legislative and not a judicial function. But the bill asked no general relief based upon the normal condition of things, but only upon the special and extraordinary or, so to speak, abnormal condition of things created by existing flood, and the defendant's tortious course of conduct. We submit that nothing can be further from a regulation of commerce than the intervention of the remedial, benign, and preventive powers of the court of equity, temporary and *pro re nata*.

If the draw in the bridge is wide enough to meet the usual and ordinary wants of navigation, it does not unnecessarily or unreasonably injure the right of navigation if it be not wide enough to pass such tows as the defendant insisting on carrying in the unusual and extraordinary exigency which existed in March, 1890.

Not Necessary to First Establish Right at Law.

But it is also said by the Court below, and by our learned opponents, that the plaintiff must first establish its RIGHTS AT LAW. How? What kind of action at law could the plaintiff have brought in the extreme exigency brooking no delay that defendant's conduct put upon it, March 29, 1880, when this bill was filed? We cannot understand the suggestion. With all respect it seems to us Quixotic. How could the suggestion be carried into effect in time to give relief? What remedy in the whole circle of remedial actions could

meet the supreme exigency which existed March 29, 1890, except the preventive powers of a Court of Equity?

The defendant's cases, cited in the brief, are not in point or applicable.

If, as in the case of *Earl of Ripon vs. Hobart*, 3 Mylne & Craig, cited by the counsel, an erection on a person's own land may or may not be a nuisance "according to circumstances," the Court may well refuse to interfere in advance, as Lord BROUGHAM declares; but how does that apply to such a case as that made by the bill in the present suit?

The case made by our bill is, we submit and proceed further to show, one which is distinctively and clearly within the established jurisdiction of equity, and consequently the decree based upon the mistaken assumption to the contrary is erroneous.

IV.

It is the settled doctrine of equity that its jurisdiction is preventive as well as remedial, and that it has power to protect property and property rights by injunction from a threatened act, which, if completed, would give a right of action, and it is not bound to have the right first established by the judgment of a court of law. And in many cases equity will protect rights connected with property, even if there be no remedy at law; a fortiori where there is a

legal right which is menaced, but where the remedy at law is inadequate.

In Prince Albert vs. Strange, 1 Mac. & G., 25, 46, Lord COTTENHAM repudiated and denied the proposition that an injunction could not be granted unless an action would lie. The jurisdiction of the Court to grant an injunction exists if there is a direct and clear interference or threatened interference with a right clearly connected with property, for which an action for damages would not be an adequate remedy.

The famous case of the Emperor of Austria vs. Day, 3 De Gex, Fish. & Jones, 217, 1861, is a striking case of Chancery interfering to prevent the commission of a threatened wrong to the "property of the plaintiff as sovereign," which threatened wrong was the manufacture of spurious Hungarian notes.

Lord Chancellor CAMPBELL said (pp. 239, 240):

"I consider that this Court has jurisdiction to protect property from an act threatened which, if completed, would give a right of action. I by no means say that in every such case an injunction may be demanded as a right, but if the party applying is free from blame, and promptly applies for relief, and shows that by the threatened wrong his property would be so injured that an action for damages would be no adequate redress, the injunction will be granted."

This is precisely the case made by our bill.

Lord Justice TURNER in the same case (p. 254), says:

"I do not agree to the proposition that there is no remedy in equity in this Court if there be no remedy at law (see Kerr Inj., 198), **and still less do I agree to the proposition that the Court is bound to send a matter of this description to be tried at law";** citing

and approving the following passage of Lord REDESDALE:

"Where the principles of law by which the ordinary Courts are guided give no right, but upon the principles of universal justice, *the interference of judicial power is necessary to prevent a wrong*, and the positive law is silent," and he instances certain cases of waste where there was an intervening legal estate, and where there was no right and no remedy at law, and yet equity interfered; adding (p. 255): "THE JURISDICTION OF THIS COURT IS PREVENTIVE AS WELL AS REMEDIAL."

In Dixon vs. Holden, L. R., 7 Eq., 488, it was held that Chancery has jurisdiction to restrain the publication of any document tending to the *destruction of property*, whether consisting of money or of professional reputation whereby property is acquired; and on this ground the publication of a notice stating that the plaintiff was a partner in a bankrupt firm was restrained.

THE DOCTRINE OF EQUITY, its foundation and its limitations, are stated with great clearness and precision by Mr. Pomeroy, 3 Eq. Jurisp., Sec. 1338:

"No. 1338. FUNDAMENTAL PRINCIPLE. In determining whether an injunction will be issued to protect any right of property, to enforce any obligation, or to prevent any wrong, there is one fundamental principle of the utmost importance, which furnishes the answer to any questions, the solution to any difficulties which may arise. This principle is both affirmative and negative, and the affirmative aspect of it should never be lost sight of, any more than the negative side. The general principle may be stated as follows: Wherever a right exists or is created by contract, by the ownership of property or otherwise, cognizable by law, *a violation of that right will be prohibited*, unless there are other considerations of policy or expediency which forbid a resort to this prohibitive remedy. *The restraining power of equity extends, therefore, through the whole range of rights and duties which are recognized by the law, and would be applied to every case of intended violation, were it not*

for certain reasons of expediency and policy which control and limit its exercise. This jurisdiction of equity to prevent the commission of wrong is, however, modified and restricted by considerations of expediency and of convenience which confine its application to those cases in which the legal remedy is not full and adequate. Equity will not interfere to restrain the breach of a contract or the commission of a tort, or the violation of any right, when the legal remedy of compensatory damages would be complete and adequate. The incompleteness and inadequacy of the legal remedy is the criterion which, under the settled doctrine, determines the right to the equitable remedy of injunction."

(The italics are the author's.)

Tried by the test of this fundamental principle, the opinion and decree below are wrong.

In the case of private rights, the rule is that the power of equity exists to prevent intended violation, except when the legal remedy of compensatory damages is complete and adequate.

Instances are numerous in the English law where an interlocutory injunction has been granted where there is

" irreparable, or, at least, serious mischief, to which the property may be exposed, before the question of legal right can be determined; as, for instance, where a coal mine is in danger of being flooded by reason of the adjoining mine being worked in a manner that the plaintiff alleges is a violation of his rights."

(Garrett, Law of Nuisances, 324. See Duke of Beaufort vs. Morris, 6 Hare, 340; Durell vs. Pritchard, L. R., 1 Ch., 244; Mogul Steamship Co. vs. McGregor, 15 Q. B. D., 476).

Mr. Pomeroy says:

" The common-law theory of not *interfering* with persons until they shall actually have committed a wrong is fundamentally erroneous; and a remedy which *prevents* a threatened wrong is in its essential nature better than the remedy which permits the

wrong to be done and then attempts to pay for it by the pecuniary damages which a jury may assess."

Pomeroy, Eq. Jurisp., Sec. 1357.

These principles we submit applied to the decree below necessarily cause its reversal.

FINALLY, I TAKE MY STAND AND PLACE MY CASE FOR EQUITABLE INTERPOSITION UPON THE FOLLOWING TWO PROPOSITIONS OF FACT AND ONE OF LAW:

1. That under the averments of the bill the bridge of the plaintiff was erected in accordance with law and its special legislative charter; that it had a suitable draw of ample size, and that the bridge was not an obstruction to navigation. It was, therefore, a lawful structure, and entitled to protection as such.

2. That in the extraordinary flood and emergency existing at the time when the bill was filed the defendants' tow of six barges was unmanageable and dangerous, threatening the bridge with instant and irreparable damage, and even destruction. Such damage is irremediable at law: 1. Because, in a pecuniary extent, it would or might far exceed the capital stock and assets of the defendant company. It is so distinctly alleged in the bill (Record, p. 3). 2. The injury to the plaintiff by damage to and destruction of its bridge, the interruption of public commerce, the necessary

stoppage of all through business, is irreparable and of a nature not capable of being ascertained and compensated for in damages, even if the defendant company had the pecuniary ability to make the compensation (Record, pp. 3, 4).

3. If the above propositions are true, the legal conclusion inevitably follows that the case presented by the bill was one justifying, and even requiring, equitable interposition. The case was one which could not be met by demurrer, and on which we insist we had the right to take proofs and have a hearing. We want a chance to prove our allegations as to the character of our bridge and the defendant's conduct. *Only this and nothing more.*

JOHN F. DILLON,
For the Texas and Pacific Railway Company,
Appellant.